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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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Petitioner (No. 893, Oct. Term 1964),
Objector below.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

To the Justices of the Supreme Court of the United States:

Erwin H. Ezzes, petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Delaware entered

on Dec. 7, 1964, which affirmed a judgment of the Chancery Court of the State of Delaware, New Castle County, which was entered on March 9, 1964. The judgment of the Delaware Chancery Court approved, subject to certain conditions with which the defendants complied, the settlement of two stockholders derivative actions.

Petitioner Ezzes was one of several stockholders who objected to the settlement.

The Within Petition for Certiorari Differs from the Petition Filed by Arthur Hoffman and Which is Pending Determination Before This Court

On or about February 10, 1965, Arthur Hoffman, another stockholder-objector, filed a petition with this court for a Writ of Certiorari (*Hoffman* v. *Chrysler Corporation*, et al., No. 893, October 1964 Term).

The basis upon which within petitioner Ezzes seeks certiorari, differs entirely from the basis upon which petitioner Hoffman in No. 893 seeks certiorari.

Jurisdiction

The judgment of the Supreme Court of the State of Delaware was made and entered on December 7, 1964. A copy thereof is annexed to this petition in the Appendix at pp. 21-22.

The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1257 (3).

Opinions Below

The opinion of the Chancery Court of the State of Delaware, is reported at 198 A.2d 185.

The opinion of the Supreme Court of the State of Delaware has been set forth in full in the Appendix to the Hoffman petition (pp. 9 to 30). For purposes of our argument, it is not necessary to refer to the entire decision of the Delaware Supreme Court. Hence we print in our Appendix hereto, on pp. 22 to 24, only that portion of the decision which relates to our argument.

Question Presented

The question presented is of nationwide importance. It involves fair corporate suffrage, and the interrelation between Federal law and its enforcement in State courts. In particular, it involves whether state courts must enforce Sec. 14(a) of the Securities Exchange Act of 1934, which prohibits the solicitation of misleading proxy statements by corporate management, not in a situation where the violation is used by a litigant for the purpose of obtaining affirmative relief, but in a situation where the violation is interposed in a State court action for the purpose of denying relief to a litigant who has chosen the State court as his forum (See II Loss-Securities Regulations (1961), pp. 977-986). There is a dearth of authority on the subject. Delaware, however, appears to hold not only that it is not required to enforce Section 14(a) in a State Court matter, but that it is prevented from doing so by the "exclusive jurisdiction" phrase of

Sec. 27 of the Securities Act (See II Loss-Securities Regulations, 1961, pp. 977 to 980).

The problem goes to the heart of fair corporate suffrage. The question is:

> Does Section 14(a) prohibit a State Court from approving the adoption of a corporate Incentive Compensation Plan which is detrimental to the stockholders, where the Incentive Compensation Plan is part of a settlement of a stockholders derivative action, where valid stockholder approval is necessary before the Incentive Compensation Plan can be adopted, and where the proxies which solicited stockholder approval were false and misleading in violation of Sec. 14(a)?

Statutes, Federal Rules and Regulations Involved

The pertinent portions of the Securities Exchange Act of 1934, 15 USC Sec. 78a et seq. (particularly Sec. 78n(a) and Sec. 78aa), and Rule 14a-9, 17 CFR 240.14a-9, are set forth in the Appendix at pp. 25-26.

Statement

Chrysler Corporation is a Delaware corporation whose shares are publicly held and sold all over the United States on the New York Stock Exchange. It is engaged primarily in the business of manufacturing and selling automobiles.

On August 12, 1960, and February 23, 1962, two stockholders derivative actions were commenced by

stockholders of Chrysler, to recover many millions of dollars against officers and directors of Chrysler for alleged wrongs to Chrysler.

On March 6, 1963, the plaintiffs and defendants in the derivative actions, entered into a stipulation of settlement of the actions. The settlement did not require the defendant officers and directors, or anyone else, to pay any monies or property to Chrysler in exchange for Chrysler's release of its claims against them. Substantially, the entire settlement consisted of changing the terms of an incentive compensation plan which had been ratified by the Chrysler stockholders in 1956 ("1956 Plan"). The new incentive compensation plan was to take effect as of 1963 ("1963 Plan").

Both the 1956 Plan and the 1963 Plan, provided for the payment to Chrysler officers, directors and employees, of compensation in addition to their stipulated salaries, if the earnings of Chrysler in any given year exceeded a certain amount as fixed by formula. The basic difference between the 1963 Plan and the 1956 Plan, was this: if the earnings of Chrysler for any given year did not reach a certain amount, the 1956 Plan would require Chrysler to pay more incentive compensation than would the 1963 Plan. If however, the earnings of Chrysler for any given year exceeded a certain amount, the 1963 Plan would require Chrysler to pay more incentive compensation than would the 1956 Plan. The difference between the operation of the two plans was summed up by the Treasurer of Chrysler as follows: If 1963 net earnings were $31,000,000, there would be no bonus under either Plan. If net earnings were between $31,000,000 and $47,000,000 there would be no bonus

under the 1963 Plan, but there would be a bonus under the 1956 Plan. If net earnings were between $47,000,000 and $101,000,000, there would be a bonus under both plans, but the bonus under the 1956 Plan would be greater. If earnings were in excess of $101,000,000, the bonus under the 1963 Plan would be greater than under the 1956 Plan.

The Board of Directors of Chrysler approved the settlement and the 1963 Plan at meetings which were held on February 7, 1963, and March 21, 1963.

Seventeen of the nineteen members of the Board were present at the meeting of February 7, 1963. Of the seventeen directors who were present, all but two were interested either as recipients of incentive compensation, or defendants in the actions, or both. The action of the Board was illegal. It violated Art. II Sec. 6 of Chrysler's By-Laws, which required a majority vote of the disinterested directors in office to constitute a quorum, and in no case less than one third of the largest number of directors fixed by the By-Laws.

Sixteen of the nineteen members of the Board were present at the meeting of March 21, 1963. Of the sixteen directors who were present, all but four were interested either as recipients of incentive compensation, or defendants, or both. The action of the Board at this meeting was illegal as violative of the aforementioned Quorum By-Law.

Neither the directors who were defendants, nor the directors who were entitled to participate in the incentive compensation plan, left the Board room when the vote was taken at either of the meetings. All

directors who were present at the meetings voted upon the matter. Article II Section 9 of the Chrysler By-Laws, which provided that no director shall vote upon a matter in which he is interested, or be present when a vote is taken upon the matter, was violated at both meetings.

The 1956 Plan had originally been approved by the Chrysler stockholders. By its terms, it could not be changed without stockholder approval. Hence valid stockholder action and approval of the 1963 Plan was necessary before it could become effective.

Since the change from the 1956 Plan to the 1963 Plan was part of the proposed settlement of a stockholders derivative action, the 1963 Plan could not take effect unless the proposed settlement and the Plan were also approved by the Delaware Chancery Court.

Prior to submitting the proposed settlement to the Delaware Chancery Court for its approval, the Chrysler directors, on or about March 6, 1963, caused Chrysler to send a proxy dated March 4, 1963 to each of its stockholders, which solicited the votes of the stockholders for approval of the 1963 Plan and the proposed settlement, at a stockholders meeting which was to be held on April 16, 1963. This proxy was false and misleading, and violated Section 14a of the Securities Act. As found by both the Delaware Chancery Court and the Delaware Supreme Court, before the date of the stockholders meeting, the directors had information which "assured the directors that the 'new' plan (1963 Plan) would produce a substantially greater fund than would the old plan (1956 Plan) for 1963." The directors knew that there had

been general public acceptance of the 1963 Chrysler model. The model year begins on August 1st of each year and ends on the following July 31st. Within the first three months of the model year, the directors find out how well the model is accepted by the public.

The 1963 model was well accepted by the public. In the first five months of the 1963 model year, Chrysler's penetration had increased to 11.9 percent of the market. By April 1963, this had further increased to 12.5 percent. This was better than 1962, when the income of Chrysler before taxes was $126,000,000. The 1963 first quarter sales were substantially ahead.

The 1963 sales target was higher than for the model year 1962. These sales objectives had already been exceeded by Chrysler. The directors were notified every ten days concerning the sales picture.

So good was the outlook, that on March 7, 1963, the President of Chrysler made a speech before the New York Society of Security Analysts, in which he stated that the "outlook for the automobile industry as a whole continues to be highly favorable," and "he can see no reason why the industry should not sell another seven million new cars at retail in 1963." On May 16, 1963, the New York Times carried an article which stated that a record year was anticipated for the auto industry in 1963.

Not one word of this information was set forth in the proxy material which solicited the stockholders votes.

The matter was voted at the stockholders meeting of April 16, 1963. Of the 9,063,502 Chrysler shares

entitled to vote, 6,699,016, or 73 percent of the total outstanding shares, voted in favor of the 1963 Plan. Of this 73 percent in favor of the 1963 Plan, 10 percent were under the control of persons who would personally gain by an increase in incentive compensation under the 1963 Plan.* The 63 percent balance was proxy-solicited.

The proxy-solicited votes were the determinative votes. These votes gave Chrysler management the stockholders quorum which was necessary in order to ratify the 1963 Plan.

Business was so good in 1963, that Chrysler earned $325,000,000 before taxes as against $126,000,000 before taxes in 1962. This resulted in an incentive compensation fund for 1963 under the 1963 Plan, which was $1,544,758.12 greater than it would have been under the 1956 Plan.

When the matter came before the Delaware Chancery Court for its approval, if found that, at the time the directors solicited the proxies and called upon the stockholders to vote upon the adoption of the 1963 Plan, the directors had vital knowledge and information which assured them that the 1963 Plan would produce a substantially greater fund for 1963 than would the 1956 Plan. The court held, however, that the only consequence of the failure of the directors to reveal this information in the proxy material, was to require the defendant directors who would have re-

* The 10 percent comprised the shares owned by management; the 660,000 shares owned by Consolidation Coal Company, whose Board Chairman was also Chairman of the Board of Chrysler; and the 350,000 shares which were voted by the trustees of the Chrysler Thrift Stock Ownership Program.

ceived more for 1963 under the 1963 Plan, to give up those additional benefits. In order to achieve this result, the Chancery Court determined that it would approve the settlement only if the defendant-directors agreed not to take more for 1963 under the 1963 Plan, than they would have received under the 1956 Plan. The defendant-directors agreed to do this, and the Chancery Court approved the settlement.

The limited condition imposed by the Chancery Court had the effect of validating the 1963 Plan, even though stockholder approval thereof was obtained in violation of the proxy solicitation requirements of the Securities Exchange Act. It permits the defendant-directors who actively participated in the violation of the Securities Exchange Act, to participate in the additional benefits of the 1963 Plan, for all years after 1963. It permits all other persons to participate in the additional benefits of the 1963 Plan, for all years including 1963. It permits these consequences to obtain, even though the Plan had its genesis in violation of the Securities Exchange Act.

The detrimental consequence of this violation of the Securities Exchange Act to Chrysler and its stockholders, has clearly been demonstrated for the years 1963 and 1964. For the year 1963, the 1963 Plan requires Chrysler to pay $1,411,118.12 more in incentive compensation than Chrysler would have been required to pay if the 1956 Plan continued in effect.* For the year 1964, the 1963 Plan requires Chrysler

* This figure comprises the $1,544,718.12 which the 1963 Plan would require it to pay, less $133,600 which the defendant-directors agreed not to take by accepting the limited condition imposed by the Chancery court.

to pay some $2,000,000 more in incentive compensation than Chrysler would have been required to pay if the 1956 Plan continued in effect.* While the figures are not yet definitely known for the model year 1965, the favorable acceptance of the 1965 Chrysler model and the highly favorable outlook for the automobile industry as a whole, indicates that if the 1963 Plan is held valid, Chrysler will be required to pay for the year 1965, in excess of $2,500,000 more than it would have been required to pay under the 1956 Plan.

Upon appeal to the Supreme Court of the State of Delaware, that court affirmed the determination of the Chancery Court. The Delaware Supreme Court refused to invalidate the 1963 Plan even though the stockholder vote was invalidly solicited in violation of the proxy solicitation provisions of the Securities Exchange Act. The Delaware Supreme Court refused to give the stockholders of Chrysler the protection of the Securities Act. It held that the limited condition imposed by the Chancery court, adequately took care of the violation of the Securities Exchange Act.

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* The net income of Chrysler for 1964 is $213,770,302 as against a net income of $161,595,098 for 1963.

I

The determination of the Delaware State Court deprives the Chrysler stockholders of the protection given them by the Securities Act of 1934.

This court has now made it clear: (a) that private parties have a right under Sec. 27 of the Securities Act to bring suit for violation of Sec. 14a of the Act; and (b) that this right of action exists as to both derivative and direct causes.

> *J.I. Case Company* v. *Borak,* 377 U.S. 426 (1964)

As pointed out by this Court in *J.I. Case,* the private right to bring suit for violation of Sec. 14a, stems from "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" (377 U.S. 426, 433).

The Congressional purpose behind Sec. 14a, is to secure to every equity security bought on a public exchange, the important right of fair corporate suffrage, and to prevent the recurrence of abuses which will frustrate the free exercise of the voting rights of stockholders. In *J.I. Case,* this Court said at 377 U.S. 426, 431:

> "The purpose of § 14 (a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief

> that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders.' *Id.*, at 14. 'Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.' S. Rep. No. 792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of the section which makes it 'unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors.*' (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."

In the case at bar, the Delaware Court refused to grant to petitioner Ezzes in his derivative capacity of litigant for all the Chrysler stockholders, the judicial relief which this court has held must be made available to every equity security bought on a public exchange, and which is necessary to carry out the Congressional purpose of insuring fair corporate suffrage

and preventing abuses which frustrate the free exercise of the voting rights of stockholders.

As acknowledged by the Supreme Court of Delaware in its opinion (Appendix, pp. 22-23), the actions of the directors in approving the 1963 Plan at the meetings of Feb. 7, 1963 and March 21, 1963, was illegal for two reasons: (a) there was no valid quorum, because virtually all of the directors who voted were interested in the outcome, and (b) the directors violated Art. II Sec. 9 of the Chrysler By-Laws, which prohibit a director from voting or being present at any matter in which he is interested, when the vote is taken. According to the Delaware Supreme Court, both of these defects could be cured only by valid stockholder action. (*Kerbs* v. *California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652, 1952). As further acknowledged by the Delaware Supreme Court, only valid stockholder action could give validity to the 1963 Plan because the 1956 Plan, by its terms, could be changed only by valid stockholder action.

It follows then, that since the Delaware Supreme Court upheld the validity of the 1963 Plan, it determined that it could give validity to the voting at the April 16, 1963 stockholders meeting, even though the affirmative votes necessary to give stockholder approval, were proxy-solicited in violation of Sec. 14a.

We submit that the determination of the Delaware Supreme Court was a denial to Petitioner Ezzes of the derivative rights which this Court in *JI Case* held that Sec. 14a gives him.

The purpose of the defendant-directors in voting approval of the settlement, was to get rid of this liti-

gation without personally paying one cent for any release, and with Chrysler and its stockholders footing the bill. The purpose of the directors in approving the change from the 1956 Incentive Plan to the 1963 Incentive Plan, was to make it look like they were proposing a fair deal to the stockholders, when, on the basis of the information which they had to the effect that the 1963 Plan would provide more incentive compensation than would the 1956 Plan, they were really trying to take advantage of the stockholders. They took advantage of the stockholders by soliciting proxies and withholding the vital information which they had. As a result of withholding this information, they succeeded in getting proxies which enabled them to vote for the 1963 Plan which will already cause Chrysler to pay out incentive compensation which is approximately $3,500,000 greater than it would have had to pay for 1963 and 1964, and which will be greater for 1965 and probably the remaining life of the 1963 Plan.

This is just the kind of abuse of corporate suffrage which Sec. 14a seeks to prevent. There was no fair corporate suffrage because vital information was withheld. The withholding of the vital information frustrated the free exercise of the voting rights of the Chrysler stockholders.

We submit that the only judicial relief which could achieve the results envisioned by the purpose of Sec. 14a, is to determine that the votes of the stockholders at the April 16, 1963 meeting were invalid because invalidly obtained in violation of Sec. 14a, and that the 1963 Plan was invalidly adopted.

II

Unless the Delaware State Court is required to determine that the proxy votes were invalid, the Chrysler stockholders will be deprived of property without due process.

The Delaware Supreme Court held that the violation of Sec. 14a was taken care of by the limited condition imposed by the Chancellor, to the effect that no director-defendant shall receive greater benefits under the 1963 Plan for the year 1963, than he would have received under the 1956 Plan. In the light alone, of what the invalid proxy solicitation is costing Chrysler in increased incentive compensation for the year 1963, the limited condition imposed by the Chancellor gives no meaningful relief to the Chrysler stockholders for the invasion of their fair suffrage rights. In the light of the increased incentive compensation which the 1963 Plan would give the defendant-directors for the year 1964, the limited condition imposed by the Chancellor which required the defendant-directors to give up their increased benefits for 1963 only, would certainly not have the effect of preventing future attempts to invade the fair suffrage rights of stockholders for the benefit of management. The defendant-directors will make up in 1964, what they agreed to give up for 1963, and then will be able to reap the further benefits of their invalid proxy solicitation in the years commencing 1965.

We point out in passing, that the judicial remedy granted by the Delaware Supreme Court, was in viola-

tion of well established principles of Federal and State fiduciary law. Apart from Sec. 14a of the Securities Act, it is well established that stockholder action can be held valid only if, as a prerequisite thereto, the directors carry out their fiduciary obligation to give the stockholders full and complete notice concerning all material facts necessary to enable them to make a knowledgeable vote (*Kerbs* v. *California Eastern Airways,* 90 A. 2d 652, Sup. Del. 1952; *Lieferant* v. *Bartel,* 36 Misc. 2d 477, 232 N.Y. Supp. 2d 1303, Sup. N.Y. 1962). In accordance with the principle that neither a fiduciary nor anyone who participates in a breach of fiduciary obligation may benefit therefrom, the Delaware state court should have determined that neither the defendant-directors nor any director who voted for the 1963 Plan, may benefit therefrom at any time during the existence of the Plan (*Magruder* v. *Drury,* 235 U.S. 106, 119 (1914); *Bennett* v. *Propp,* 187 A. 2d 405, Sup. Del. 1962). In accordance with the principle that a third person may not benefit from a breach of fiduciary obligation if he gave no value or had notice of the breach, the court below should have determined that no one may benefit from increased incentive compensation at any time under the 1963 Plan (*Higgins* v. *Shenango Pottery Company,* 279 F. 2d 46, 3rd Cir., 1960; *Cahall* v. *Lofland,* 12 Del. Ch. 299, 114 A. 2d 224, 1921).

It is our view that the failure of the Delaware State Court to apply the above well established principles of fiduciary law, has the effect of depriving the Chrysler stockholders of property without due process. This deprivation of due process, is compounded by the clear denial to the Chrysler stockholders, of the protection given them by Sec. 14a of the Securities Act.

III

The Delaware State Court should be required to give the Chrysler stockholders the protection of Sec. 14a.

There are circumstances where a litigant requiring the protection of a Federal Statute, cannot choose a Federal forum. In such case, he must look to the State court for protection under the Federal Statute.

In many instances, the State law may differ from the Federal law as to the quality and kind of protection which is afforded. If the State court is permitted to disregard the protection afforded by the Federal Statute, the litigant who requires the protection of the Federal statute, will be deprived of property without due process and will be placed upon an unequal footing with a litigant who has the choice of whether to go to a Federal or State forum.

In the case at bar, petitioner Ezzes is acting in his derivative capacity for the benefit of all stockholders. He claims that stockholders' approval of the 1963 Plan, was illegally obtained in violation of Sec. 14a of the Securities Act. Because the issue arose in connection with the settlement of a stockholders' derivative action and in circumstances where the proponents of the settlement participated in the violation, petitioner Ezzes had no alternative but to assert his claim in the State court as a defense to the relief which the proponents of the settlement sought when they requested the State Court to approve the settlement and the 1963 Plan which is part of the settlement.

The State Court of Delaware has refused to give the Chrysler stockholders the protection of the Securities Act, and has held that the 1963 Plan was validly approved by the stockholders even though the proxy solicited vote was vital and that vote was solicited in violation of Sec. 14a. If the determination of the State Court is permitted to stand, it will mean that State Courts in these circumstances can disregard applicable Federal Statutes and grant immunity for violations thereof. In order to make it clear that State courts are forbidden to do this, the within petition for certiorari should be granted.

IV

The writ of certiorari should be granted in order to safeguard fair corporate suffrage.

JI Case holds that in a Federal forum, fair corporate suffrage must be protected by the granting of judicial relief which will carry out the purposes of Sec. 14a. The question posed by the within petition for certiorari is whether, in the circumstances of the case at bar, a State court must grant the same judicial relief regardless of whether State law differs from Federal law.

The question is one of nationwide importance. *JI Case* only goes part of the way to protect equity security investors on public exchanges, by assuring them of the protection of Sec. 14a in Federal forums. In order to complete the protection of such equity security investors, this court must make clear that State courts are required to give the same protection.

Conclusion

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

Mandate (Judgment) Supreme Court of Delaware

(Pursuant to Rule 14)

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of the Court of Chancery of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

Sol A. Dann, et al. v. Chrysler Corporation, et al., No. 1330
Mary L. Gallo, et al. v. Paul C. Ackerman, et al., No. 1585

a certain judgment or order was entered on the March 9, 1964, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on November 18, 1964, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed, with costs, hereby taxed in the sum of $4,328.60 to be recovered by certain defendants below, appellees in the amount of $3,890.11, and plaintiffs below in No. 1330 except Sol A. Dann in the

amount of $438.49 against the appellee Chrysler Corporation, with right of execution.

WITNESS The Honorable Daniel F. Wolcott, our Associate Justice at Dover, the first day of January, A.D. 1964.

Issued December 7, 1964.

T. E. TOWNSEND, JR.,
Clerk of the Supreme Court.

Excerpts from Decision of Supreme Court of Delaware

The objector Ezzes makes a final point to the effect that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained.

He points out that of the directors present at the meetings of February 7, 1963 and March 21, 1963, which resulted in the recommendation of the Plan to the stockholders, all but two on February 7, and all but four on March 21, were either recipients of incentive compensation or defendants in these actions or both. Upon this fact, it is argued that the Board's action in approving the settlement, including the amendment to the Plan, was invalid as a violation of Article II, Section 6 of Chrysler's bylaws requiring a majority of directors in office to constitute a quorum, and as a violation of Article II, Section 9 of the bylaws providing that no director shall vote upon a

matter in which he is interested, or be present when the vote is taken.

Ezzes overlooks the fact that the action of the directors did not bind Chrysler to the amendment in the Compensation Plan since, under the then-existing Plan, the sole method of change was by stockholder action. The most the directors could do in this respect was to submit to the stockholders the proposed change. This is what was done. Whether or not, therefore, there was some legal defect in the directors' action, that defect could be cured by informed stockholder action. *Kerbs* v. *California Eastern Airlines,* 33 Del. Ch. 69, 90 A. 2d 652.

Ezzes says, however, that there was no effective stockholder action because a fair disclosure of the facts was not made to the stockholders in that they were not informed of the future profit potentials of Chrysler and the resulting possibility of payment of greatly increased incentive compensation under the amended Plan. He charges that before April 16, 1963, the date of the stockholders' meeting, the directors knew that the new Plan would produce a substantially greater fund for incentive compensation for 1963 than would the old Plan; that there had been general public acceptance of Chrysler's 1963 model; that sales and earnings figures pointed to an outstanding year for Chrysler, and that general conditions known to the automobile industry indicated that the industry would have an outstanding year in 1963. The failure to include this information in the proxy material and the notice of settlement hearing, it is asserted, constituted a breach by the directors of their

duty to make a full and frank disclosure to stockholders.

It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.

In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan. The Chancellor, however, imposed as a condition upon his approval of the settlement the requirement that no director-defendant shall receive greater benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection.

Securities Exchange Act of 1934

Sec. 14(a), 15 U.S.C. Sec. 78n(a)

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Sec. 27, 15 U.S.C. Sec. 78aa

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district, or in the district wherein the defendant is found or is an inhabitant or

transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Rules and Regulations Under Securities Exchange Act of 1934

Rule 14a-9, 17 CFR § 240.14a-9

False or misleading statements. No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

against

SOL. A. DANN, ET AL., and MARY L. GALLO, ET AL.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, ET AL., and PAUL C. ACKERMAN, ET AL.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA JUDSON, ET AL.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 89, Oct. Term 1964).
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION TO PETITION OF ERWIN H. EZZES

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IN THE

Supreme Court of the United States

October Term, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

against

SOL A. DANN, *et al.*, and MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, *et al.*, and PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, October Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION TO PETITION OF ERWIN H. EZZES

This brief is confined to opposition to the instant Ezzes petition for a writ of certiorari. The Gallo respondents have heretofore filed a separate brief in opposition to the Hoffman petition for such writ (No. 893, October Term, 1964).

Opinions Below

The opinions of the Court of Chancery of the State of Delaware are reported as *Dann* v. *Chrysler Corporation* in 198 A. 2d 185 (1963), and are reprinted in the Appendix to the Gallo brief in opposition to the Hoffman petition (Gallo A 1-41).* The opinion of the Supreme Court of the State of Delaware, affirming the judgment of the Court of Chancery, is reported as *Hoffman* v. *Dann* in 205 A. 2d 343 (1963), and is reprinted in the Appendix to the Hoffman petition (Hof. 9-30).

Jurisdiction

Petitioner Ezzes contends for jurisdiction of this Court based on 28 U. S. C. § 1257(3). He asserts that a federal question is involved in relation to Section 14(a) of the Securities Exchange Act of 1934 ("the Act"), 15 U. S. C. Sec. 78n(a), and Rule 14a-9, 17 CFR 240.14a-9**, promulgated thereunder by the Securities and Exchange Commission ("SEC").

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* Reference will be made to the following Appendices: to this brief (GA); to the Gallo brief in opposition to the Hoffman petition (Gallo A); to the Ezzes petition (Ezzes A); to the Hoffman petition (Hof. A); and to the printed appendix of the defendants-appellees in the court below (A). Docket entry references will be denominated S. Ct. Dkt. # , for those of the Supreme Court of Delaware; Gallo Dkt. # , for those of the Gallo action in the Court of Chancery; and Dann Dkt. # , for those of the Dann action in the Court of Chancery. Gallo exhibits will be referred to as GX; defendant exhibits as DX; and objector exhibits as OX.

** Petitioner Ezzes has printed only a portion of Rule 14a-9 in his appendix (Ezzes A 26), omitting a pertinent part. Accordingly, the Rule is printed in its entirety in the appendix to this brief (GA 14-15). In addition, the petitioner does not refer to any of the other relevant Rules promulgated by the SEC under Sec. 14(a) of the Act, particularly Rule 14a-3 and Schedule 14A, pertinent parts of which are printed in the appendix to this brief (GA 13-14).

The Gallo respondents submit that this Court does not have jurisdiction to entertain the instant petition. The petition was not filed within the time prescribed by 28 U. S. C. § 2101(c). No federal question was raised by petitioner before the Delaware courts; and none was decided by the Delaware courts.

Questions Presented

The litigation before the Court of Chancery involved two stockholders' derivative actions which had been instituted in behalf of Chrysler Corporation ("Chrysler"), a Delaware corporation. A proposed settlement was presented to that court for approval. A principal feature of the settlement is the modification of the Incentive Compensation Plan of Chrysler. Both the proposed settlement and the stockholders' resolution modifying the Plan were approved by the stockholders of Chrysler, subject to court approval. After extensive hearings, on notice to all Chrysler stockholders, the Court of Chancery approved the settlement. The Supreme Court of Delaware affirmed.

The petitioner predicates his application for certiorari on the ground that the Delaware courts should not have approved the adoption of the Plan modification because, as he asserts, its approval by the stockholders was solicited by false and misleading proxies in violation of Section 14(a) of the Act.

Petitioner's contention is bottomed on unfounded assumptions. He assumes that the proxy statement was false and misleading. The Delaware courts, however, found to the contrary. He also assumes that the application of Section 14(a) was specially set up or claimed by him below to be an issue for determination by the Delaware courts. This he never did below. He further assumes that Section 14(a) was violated; and this also is a false assumption.

The Gallo respondents will presently demonstrate:

1. That petitioner failed to file timely his petition for a writ of certiorari within ninety days after the final determination of the Supreme Court of Delaware.

2. That under Delaware practice, the Supreme Court of Delaware will not review any question which has not been fairly presented to the Court of Chancery. The petitioner never raised a federal question before the Court of Chancery. Furthermore, petitioner did not raise a federal question before the Supreme Court of Delaware; and none was decided by that court.

3. That the proxy statement contained full disclosure as required both by Delaware law and by Section 14(a) and the Rules promulgated by the SEC thereunder. The Delaware courts found that the stockholders' vote was validly obtained.

Counter-Statement of the Facts

The Court is respectfully referred to pages 4-14 of the Gallo brief filed in opposition to the Hoffman petition, for a summary of the proceedings in the instant litigation. However, to correct certain errors in the Ezzes statement of facts, a limited counter-statement is necessary here.

The Stipulation of Settlement was signed by all counsel subject to court approval (A 31-41). It was executed by Chrysler counsel upon authorization of the Board of Directors (A 41; OX 411). As part of the settlement, the Board adopted a resolution "recommending to the stockholders" that they adopt resolutions modifying the Incentive Compensation Plan, subject to the approval of the settlement by the court (OX 412; A 34; GA 6).

A detailed and court-approved Notice of Settlement was enclosed with the Proxy Statement, dated March 4, 1963, for the Annual and Special Meetings of Chrysler

stockholders held on April 16, 1963 (DX 300; A 7-30; GA 3-12), at which, *inter alia*, the Chrysler stockholders voted in favor of the settlement and the proposed Plan modification. The stockholders were advised in the Proxy Statement that a vote in favor of the Plan modification "will, in effect, be a vote in favor of the settlement" (GA 6).

Ezzes states at pages 6-7 of his petition that the "approval" of the settlement and modified Plan by the Board of Directors was invalid as being in violation of Art. II, Secs. 6 and 9, of Chrysler's By-Laws. That statement is clearly contrary to the finding of the Delaware Supreme Court (Ezzes A 22-23). Moreover, if Board "approval" of the proposed settlement could not have been given, then Chrysler could not have become a signatory to the proposed Stipulation of Settlement, and neither this nor any other settlement of stockholders' derivative litigation would be possible. The Delaware law does not lend itself to such an impossible situation* Furthermore, the court held that whether or not there was some legal defect in the directors' action, that defect could be cured by informed stockholder action (A 23).**

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* A similar argument was made before the Delaware Supreme Court in *Rome* v. *Archer*, 197 A. 2d 49 (S. Ct., Del., 1964), and was found to lack merit: "Again, this argument begs the question since it presumes the validity of plaintiff's case, and, if this were a valid objection, settlement of derivative suits would be impossible. In addition, the settlement agreement was ratified by a very large majority of the shareholders and was opposed only by these objectants."

** In addition, Article II, Sec. 9, of the By-Laws of Chrysler specifically provides that the Board of Directors in its discretion may submit any contract or act for approval or ratification at any annual or special meeting of stockholders and any such contract or act which is approved or ratified by a vote of the holders of a majority of Chrysler's stock "shall be as valid and as binding upon the Corporation and upon all the stockholders as though it had been approved and ratified by every stockholder of the Corporation" (A 220).

Ezzes makes the unfounded claim that the Proxy Statement was false and misleading and violated Section 14(a) of the Act. At pages 7-10 of his petition, he contends, at the time the settlement negotiations were finalized in February and March 1963, that based on future earnings for the *full* calendar year, the directors were "*assured*" that the modified Plan would produce a substantially greater fund than would the old Plan for calendar 1963. He makes this contention despite the fact that not even the first quarter of calendar 1963 had been completed at the time and notwithstanding obvious uncertainties as to public reception of the 1964 Chrysler models scheduled to appear in August 1963. The failure of the directors to disclose such "assured" result in the Proxy Statement, he asserts, rendered it false and misleading and violative of Section 14(a). He reaches this untenable conclusion by misapplying and misquoting the decision of the Chancellor. Parenthetically, this is aside from the fact that Ezzes never specially set up or claimed a violation of Section 14(a) before the Delaware courts.

At no time during the settlement proceeding before the Chancellor did Ezzes contend that the Proxy Statement was false and misleading on the prospective earnings theory. In his briefs to the Chancellor(Dann Dkt. #238, 249), Ezzes raised other unrelated theories upon which he claimed that the Proxy Statement was false and misleading. However, the Chancellor specifically found in his decision that the Proxy Statement was *not* false and misleading (Gallo A 9):

> "I should note preliminarily that the objector Ezzes charges that the 1963 proxy statement was tainted with fraud. This charge is based on the claim that the statement did not adequately or fully describe the nature of the claims and the effect of the proposed settlement. I find no merit to these charges."

The Chancellor considered 1963 earnings solely in the context of his determination of the fairness of the proposed settlement; and particularly his evaluation of the proposed Plan modification insofar as the director defendants were concerned because the Plan modification was tendered as the basis of the settlement rather than any "consideration" flowing directly from the defendants (Gallo A 39). The Chancellor's decision was rendered on December 31, 1963 (Gallo Dkt. #82). He imposed a limited qualification on his approval of the fairness of the settlement by requiring as a condition to approval that the defendant directors forego any bonus awards under the modified Plan for the year 1963 in excess of what they would have received under the old Plan (Gallo A 36). The Chancellor imposed this condition after concluding that the directors finalized the settlement in February and March 1963 "in the context of a profit picture for Chrysler that *practically* assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963." (Gallo A 36, 40).

At page 7 of his petition, Ezzes misquotes the Chancellor by omitting the important qualifying word, "*practically.*" Thereafter, for the balance of his petition Ezzes assumes the position that the directors had assured knowledge in that respect at the time the Proxy Statement was sent to the stockholders in early March 1963, which is altogether different from what the Chancellor found. Significantly, in his decision on reargument, the Chancellor uses the words, "expectations" and "probably assure", in his discussion of the limited condition he imposed (Gallo A 40). Moreover, the Delaware Supreme Court in adverting to the limited condition referred to the "fortuitous circumstance" that Chrysler's earnings for 1963 were greatly larger than for 1962 (Hof. A 27).

Ezzes himself recognized that there was no *assurance* with respect to the amount of 1963 earnings or that 1963

earnings would exceed the cross-over point. In arguing against the fairness of the proposed settlement, at pages 51-52 of his principal brief to the Chancellor, dated June 28, 1963 (Dann Dkt. #238), Ezzes stated: "If * * * the probable earnings expectation becomes a reality * * *." In his reply brief, dated August 12, 1963 (Dann Dkt. #249), he stated at pages 1-2: "During the course of the hearings, there was speculation concerning whether the cross-over point would be exceeded in 1963."

The Chancellor in no sense related the limited condition to the Proxy Statement, nor did he, in the remotest degree, conclude or infer that the Proxy Statement was false and misleading by reason of any non-disclosure. In fact, the Chancellor made the express finding that the Proxy Statement was not false or misleading (Gallo A 9).

Importantly, after the Chancellor's decision, on his motion for reargument thereof, Ezzes did not contend that the stockholders' vote approving the settlement and Plan modification was invalid because of any non-disclosure in the Proxy Statement (GA 1). He sought only to have the limited condition extended to all 3,009 officers and employees who were covered under the Plan, so that the new Plan formula would not become operative until the year 1964 (GA 1). The motion for reargument was denied (Gallo A 38-41).

It was not until his principal brief on appeal to the Delaware Supreme Court that Ezzes for the first time contended that the Proxy Statement was false and misleading because of alleged non-disclosure of the directors' knowledge of Chrysler's 1963 earnings. But, he relied *solely on Delaware law* and did not make reference to Section 14(a) or to Rule 14a-9.

Finally, in his reply brief, at page 5, Ezzes contended, by way of response and in the context of cited State court decisions, that the Proxy Statement itself should have con-

tained the alleged information about the prospective financial condition of Chrysler regardless of the fact that the stockholders had received the Annual Report in the preceding month. At that juncture he made a passing (and his only) reference to Rule 14a-9 [not to Sec. 14(a)]; and this, illustratively, in support of his limited common law reply argument (S. Ct. Dkt. #16).

The Delaware Supreme Court rejected Ezzes' common law arguments concerning the claimed invalidity of the stockholders' vote (Ezzes A 24). The court was satisfied that the stockholders were fully informed and acted in the light of their information. The court considered that in any event the limited condition imposed by the Chancellor took care of Ezzes' charge that the directors knew that the modified Plan would produce a greater bonus fund for 1963 than would the old Plan if, "possibly", the stockholders did not also know this (Ezzes A 24).

Ezzes did not file a petition for reargument with the Supreme Court of Delaware.

With respect to the Plan modification itself, both the Chancellor and the Delaware Supreme Court found that the modified Plan is beneficial to Chrysler and its stockholders (Gallo A 28, 35-36; Hof. A. 24, 28). Ezzes' assertion, interspersed throughout his petition, that the modified Plan is detrimental, is contrary to the findings of the Delaware courts and to the extensive record establishing its benefits.

ARGUMENT

I.

This Court does not have jurisdiction to entertain the Ezzes petition.

A. The Ezzes Petition Was Not Timely Filed.

The decision of the Supreme Court of Delaware was rendered on November 17, 1964, and docketed the next day (S. Ct., Dkt. #19). It expressly affirmed the judgment of the Court of Chancery (Hof. A 30). The decision was the final determination of the Delaware Supreme Court; it was never modified or amended thereafter. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211-12 (1952). The time for filing the instant Ezzes petition commenced running from the date of final decision of the Supreme Court of Delaware, irrespective of the later date of mandate. *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 551 (1945). Petitioner Ezzes did not seek reargument before the Delaware Supreme Court. For his purposes then, the November 17, 1964 decision of the highest Delaware court was then and there the final determination in the case. As this Court stated in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 306 (1962), "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstone of federal procedure."

Nor may the motions for reargument made to the Delaware Supreme Court by others than Ezzes, which did not result in any change in the final decision, operate to extend Ezzes' time to file for certiorari. He did not seek reargument himself. *Zimmern* v. *United States*, 79 F. 2d 703 (5th Cir., 1935), reversed on other grounds, 298 U. S. 167 (1936).

Petitioner Ezzes did not file his instant petition until March 4, 1965, more than ninety days after the final decision. His filing is late and not within the time prescribed by 28 U. S. C. § 2101(c). This Court therefore does not have jurisdiction, it is submitted. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co., supra.*

B. No Federal Question Was Specially Set Up or Claimed by Petitioner in the Delaware Courts.

The jurisdiction of this Court to review the final determination of the Supreme Court of Delaware attaches only if the petitioner "specially set up or claimed" a federal question and brought such claim and the grounds therefor, with fair precision, to the Delaware courts for determination. *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928).

Ezzes did not comply with this prerequisite to jurisdiction.

Firstly, this Court has held on numerous occasions that if State procedure requires a question to be raised in the State court at the trial level and the petitioner failed to do so, this Court will not entertain jurisdiction if the State's highest tribunal declined to entertain the question. State procedure in this respect applies to federal questions just as it does to questions of local or general law. *John* v. *Paullin,* 231 U. S. 583, 585 (1913); *Bailey* v. *Anderson,* 326 U. S. 203 (1945). As this Court stated in *John* v. *Paullin,* "In legal effect, however, the case stands as though no appeal has been prosecuted from the judgment rendered by the trial court" (231 U. S., p. 587).

Delaware procedure prescribes that no question may be raised on appeal to the Delaware Supreme Court unless it has been fairly presented to the court below for decision.

Rule 5(7), Rules of the Supreme Court of Delaware (Vol. 13, Del. Code Ann., Court Rules, 1964 Supp., pp. 5-6).*

This rule has long been the prescribed procedural requirement in Delaware. *Pepe* v. *State,* 171 A. 2d 216, 219 (S. Ct., Del., 1961), appeal dismissed, cert. den. 368 U. S. 31 (1961); *Robinson* v. *Meding,* 163 A. 2d 272, 277-8 (S. Ct., Del., 1960); *Cottrell* v. *Pawcatuck Company* 36 Del. Ch. 169, 128 A. 2d 225, 233 (S. Ct., Del., 1956), cert. den. 355 U. S. 12 (1957); *Kerbs* v. *California Eastern Airways, Inc.,* 91 A. 2d 62, 63 (S. Ct. Del., 1952); *Equitable Trust Co.* v. *Gallagher,* 77 A. 2d 548, 549-550 (S. Ct., Del., 1950); *Shanik* v. *White Sewing Machine Corporation,* 25 Del. Ch. 371, 19 A. 2d 831 (S. Ct., Del., 1941); *Stephenson* v. *Commonwealth & Southern Corp.,* 19 Del. Ch. 447, 168 Atl. 211 (S. Ct., Del., 1933).

In the *Cottrell* case, *supra,* the appellant sought to raise a constitutional question for the first time on his appeal to the Delaware Supreme Court. In accordance with the rule, the court declined to consider the question.

The record is clear that Ezzes did not raise any federal question before the Delaware Chancery Court. He never there contended that Section 14(a) or Rule 14a-9 had been violated. He did not even raise under Delaware law the matter of the claimed invalidity of the stockholders' vote on the theory contended for in this Court. Nor did he advance that theory before the Chancellor on his motion for reargument, either on federal or non-federal grounds.

Consequently, having failed to comply with the Delaware rule by not presenting the federal question to the

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* Rule 5(7) provides:

"(7) *Questions Which May Be Raised on Appeal.* On appeal, any question may be raised which has been fairly presented to the court below for decision, and it shall not be necessary again to raise any such question raised in the cause by way of motion for a new trial."

Court of Chancery, he may not raise the federal question in this Court. *John* v. *Paullin, supra; Bailey* v. *Anderson, supra.*

Moreover, Ezzes did not specially set up or claim a violation of Section 14(a) and Rule 14a-9 in the Supreme Court of Delaware. In his principal brief to that court he raised the question presented to this Court solely on grounds of State law.* He made only passing reference to Section 14(a) and Rule 14a-9, and that for the first time, in his reply brief for purposes of replication and, illustratively, in support of his State law contentions. As this Court appositely stated in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 653, 655 (1897):

> "Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question. * * * The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference but only from averment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

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* Rule 9(2)(d) of the Rules of the Delaware Supreme Court requires that the appellant set forth in his principal brief a statement of the questions involved and, "Except for unusual and compelling reasons, no point will be considered that is not set forth in or necessarily suggested by the statement." Rule 9(2)(f) prescribes that the Argument in the appellant's Principal Brief "shall be divided, under appropriate headings distinctly set forth, into as many parts as there are questions presented." Ezzes did not set forth the claimed violation of Section 14(a) or Rule 14a-9 as a question nor did he raise any point of such statutory violation in his argument (Vol. 13, Del. Code Ann., Court Rules, p. 16).

Petitioner Ezzes has failed to comply with Rule 23(f) of this Court. He does not specify the information required by that rule to show that the federal question was timely and properly raised in the Delaware courts so as to give this Court jurisdiction. It is apparent that he is unable to do so.

Having failed timely and properly to raise a federal question in the Delaware courts, and none having been decided, Ezzes may not raise the federal question for the first time in this Court. *White River Lumber Company* v. *Arkansas*, 279 U. S. 692, 700 (1929); *Whitney* v. *California*, 247 U. S. 357, 362-3 (1927); *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248 (1902).

Even if Ezzes had properly raised both the federal and non-federal grounds before the Delaware Supreme Court, this Court would nevertheless decline jurisdiction to review because the state court decision was rendered on adequate non-federal grounds. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 164 (1917); *Berea College* v. *Kentucky*, 211 U. S. 45, 53 (1905); *Wood* v. *Chesborough*, 228 U. S. 672, 677 (1913).

II.

The 1963 proxy statement complied fully with the requirements of both Delaware Law and Section 14(a) of the Act and the Rules of the SEC promulgated thereunder.

A. The Inclusion in the March 4, 1963 Proxy Statement of an Estimate of Future Earnings of Chrysler, as Ezzes Urges, Would Have Constituted a Flagrant Violation of Both Delaware Law and the Proxy Rules of the SEC.

The Delaware Supreme Court expressly found that "no one can predict Chrysler's future earnings", and that "in a business such as the automobile industry, profits take their ups and downs" (Hof. A 28). The Chancellor also

noted that "no one can predict with certainty what degree of success Chrysler will have in its operations in future years." (Gallo A 32). He also noted Chrysler's past history of profitable and loss years (Gallo A 32). He further stated that "no one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables." (Gallo A 32).

As shown in the counter-statement of facts in this brief, the Chancellor imposed the limited condition in the particular context of his evaluation of the fairness of the settlement, and not on any basis of a false and misleading Proxy Statement. Obviously, the Chancellor did not find that the defendant directors in February and March 1963 knew as an existing and accomplished fact what the earnings were or would be for the full twelve months of the calendar year 1963. It is petitioner Ezzes only who leaps beyond the scope of the Chancellor's decision to reach his unfounded conclusions that those defendants in February and March 1963 had "assured" knowledge of the full year 1963 earnings, and that by failing to disclose such "information" in the March 4, 1963 Proxy Statement they violated Section 14(a) and Rule 14a-9.

The earnings history of Chrysler in the five years preceding 1963 serves as a significant background in this respect (GX10-13; OX4(9)):

Year Ended December 31	Net Earnings (or Loss) (Consolidated)
1962	$65,433,936
1961	11,138,436
1960	32,154,393
1959	(5,431,024)
1958	(33,824,565)

The chief executive officers of Chrysler testified at the settlement hearings that they could not possibly predict the earnings of Chrysler for the year 1963, because of the

volatile nature of the business and the many uncertainties and variables involved (A 135-138; A 145-146; A 109-110). Furthermore, while the Chrysler 1963 models had received public acceptance, the Chairman of the Board testified that there was then no way of knowing how the public would receive the 1964 models. The 1964 model year began in August 1963. Consequently, the last quarter of the calendar year 1963 was critical (A 137).

The SEC considers the prediction of earnings in a proxy statement to be a primary evil. It explicitly includes that type of prediction in its first example under Rule 14a-9 of what the Commission considers may be misleading (GA 15). The SEC added the examples to Rule 14a-9 in 1956.* The first example provides:

> "(a) Predictions as to specific future market values, earnings, or dividends." (GA 15)

Commissioner J. Sinclair Armstrong ** expressed the underlying basis for the examples included under Rule 14a-9:

> "The Commission's experience in the administration of the proxy rules in connection with contest for control of management indicates that the problem with respect to potentially misleading statements and omissions of material fact tend to fall into one of several general categories:
>
> • • •
>
> "7. Claims, promises, or projections as to future earnings, dividends, sales, and increase in value of assets or stock based on mere conjecture or distortion, • • •.

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* Ezzes did not print in his appendix the examples forming part of Rule 14a-9 (Ezzes A 26). They are fully set forth in the appendix to this brief (GA 15).

** Armstrong, *The SEC and Proxy Contests*, 181 Comm. & Fin. Chron., 1032, 1035 (1955), reprinted in Part 3, Stock Market Study, Hearing before Subcom. of Senate Comm. on Banking and Currency, 84th Cong., 1st Session (1955) 1569, 1575-1576.

> "Every one that I have mentioned resulted from actual experience with specific cases, and in each instance the principle involved was hammered out administratively in an effort to hew to the line of fair disclosure for the benefit of the investing public."

The SEC and the Federal courts have uniformly found to be false and misleading under the Proxy Rules the inclusion of forecasts and projections of future earnings in proxy statements. *American Kid Co.*, 1 S. E. C. 694, 698-699 (1936); *United States v. Grayson*, 166 F. 2d 863, 866 (2nd Cir., 1948); *Union Pacific R. Co. v. Chicago and North Western Ry. Co.*, 226 F. Supp. 400, 407-410 (N. D. Ill., 1964).

In the *Union Pacific R. Co.* case, the court found predictions of future earnings in solicitation material to have been false and misleading under Rule 14a-9 and the first example thereunder. The court aptly stated:

> "The Commission's Rule 14a-9 offers 'predictions as to specific future market values, earnings, or dividends' as its first example of what may be false and misleading. There is good reason for this emphasis on prediction. Bald statements contrary to concrete and historic fact run the risk of ready refutation and exposure, and to that degree are self-policing. Predictions, estimates, and opinions are more elusive and may present graver dangers of misleading the investing public. * * * 'Since an expert can speak with authority only as to subjects upon which he has professional knowledge and since no engineering course or other professional training has ever been known to qualify anyone as a clairvoyant, attempts by companies to predict future earnings on their own or on the authority of experts have almost invariably been held by the Commission to be misleading because they suggest to the investor a competence and authority which in fact does not exist.' Heller, Disclosure Requirements Under Federal Securities Regulation, XVI The Business Lawyer 300, 307 (1961). Whether the prediction is the product of an intent to mislead or of innocent overenthusiasm, the misleading effect upon the

> investing public is the same. * * * The court is constrained to agree with the judgment of the SEC staff that such predictions mislead by conveying a certitude which inherently they cannot possess." (226 F. Supp., pp. 408-9)

Obviously, it would have been improper for the management of Chrysler in the Proxy Statement to have predicted future earnings for the full calendar year 1963, or to base any opinions thereon, at a time when the first quarter of the year had not even been completed. This is especially true in the light of the nature of Chrysler's business and its then past earnings history, and the expressed inability of the chief executives of Chrysler to make any such predictions.

At this juncture, it is appropriate to consider that the Chancellor did not find that the defendant directors had "assured" knowledge, albeit Ezzes misquotes him thusly. The Chancellor's finding was limited to "practically assured", "expectations", and "probably assured." There is a wide difference between "assured" and "practically assured", as indicated in *James Blackstone Memorial Library Association* v. *Gulf Mobile and Ohio Railroad Company*, 264 F. 2d 445, 449-451 (7th Cir., 1959). cert. den. 361 U. S. 815 (1959). In that case, the court held that there was no fraudulent concealment or breach of fiduciary duty under Section 10(b) of the Securities Exchange Act by failure of the defendant to disclose to plaintiffs at the time it purchased their shares that a sale of the leasehold property involved was then "practically assured." The property sale became "assured" some seven months after the stock sale. The court distinguished the line of cases in which the property sale was in fact assured at the time of the stock sale.

B. The March 4, 1963 Proxy Statement Contained All the Material Information Required by Delaware Law and the Proxy Rules of the SEC.

Rule 14a-3(a) requires, *inter alia* that a proxy statement contain the information specified in Schedule 14A (GA 13). The 1963 Proxy Statement fully complied with Schedule 14A. The application of both the old and the modified Plan was carefully spelled out (GA 7-12). The Proxy Statement points out clearly that a higher award would be payable at a certain level of higher earnings. As required by Item 9 of Schedule 14A (GA 13), a comparison is made with 1962 figures ("the last fiscal year of the issuer")*. It is pointed out that for 1962, at all levels of earnings above $93,000,000 "the total provision permitted for awards would have been higher than under the present (old) formula***." (GA 8).

In this connection also, before the Chrysler annual and special stockholders meetings held on April 16, 1963, the stockholders had already received the 1962 Annual Report (OX 409), as required by proxy Rule 14a-3(b), which in pertinent part is printed at GA 13. In the 1962 Annual Report, the stockholders were advised in detail about the financial advances made by the Company during the year, as particularly set forth in the statement of the Chairman of the Board and President of Chrysler (GA 2). Deriving such information from an Annual Report prior to the stockholders meeting is also in accord with Delaware law. *Johnson* v. *Consolidated Film Industries, Inc.*, 22 Del. Ch. 262, 267, 194 Atl. 844, 845-6 (Ch. Ct., 1937) aff'd 22 Del. Ch. 407, 197 Atl. 489 (S. Ct., Del. 1937).

It is clear that the stockholders were fully informed of the financial condition of Chrysler at the time. Their approval of the settlement and the Plan modification was

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* The pattern of the Proxy Rules requires a comparison with or disclosure of fully established financial data of prior fiscal years or periods and not projections, future estimates, or opinions.

based upon a fully informed judgment, as both the Chancellor and the Delaware Supreme Court found. Ezzes' contentions in this respect, therefore, are misconceived and erroneous.

C. Petitioner Ezzes Was Afforded Full Relief in the Delaware Courts.

The contention of petitioner Ezzes under his Point III that the Delaware courts did not give the stockholders the protection of the Act is untenable. The main thrust of Ezzes' argument is that the 1963 Proxy Statement was false and misleading. It is fully established that the Delaware courts apply the same standards under its own law as do the Federal courts in applying Section 14(a), with respect to false and misleading proxy statements.

In *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D. Del., 1954), the court granted summary judgment for the defendant in an action instituted under Section 14(a) of the Act, on the ground of *res judicata*. The same stockholder had also instituted an action in the Delaware Court of Chancery claiming, *inter alia*, that the proxy statement involved was false and misleading under Delaware law. She made the same claim in her federal suit; but there, under Section 14(a) and the SEC Proxy Rules. The Chancellor had found that the proxy statement was not false and misleading. *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 218-219, 91 A. 2d 786, 790-1 (Ch. Ct., 1952). The federal court found that the gist of the actions was the same. It determined that the issue of fraudulent misrepresentations and omissions were conclusively determined against the plaintiff in the Chancery Court action.

The same standards were likewise applied by the Delaware Court of Chancery in the following cases, all relating to claims of false and misleading proxy statements. *Empire Southern Gas Co.* v. *Gray*, 29 Del. Ch. 95, 46 A. 2d 741 (Ch. Ct., 1946); *Hauth* v. *Giant Portland Cement Co.*,

33 Del. Ch. 496, 96 A. 2d 233 (Ch. Ct., 1953); *Campbell* v. *Loew's Incorporated*, 134 A. 2d 852, 864-865 (Ch. Ct., Del., 1957); *Kerbs* v. *California Eastern Airways, Inc.*, 94 A. 2d 217 (Ch. Ct., Del., 1953).

Significantly, in the *Empire Southern Gas Co.* case, the Chancellor was guided by the Section 14(a) case of *S.E.C.* v. *O'Hara*, 28 F. Supp. 523 (D. C., Mass., 1939) in determining the relief to be granted so as to prevent stockholder disenfranchisement. In the *Campbell* case, the Chancellor recognized the SEC review of the proxy material there involved. Furthermore, in the *Empire Southern Gas Co.*, *Hauth* and *Kerbs* cases, the Chancellor gave important consideration to the Sec. 14(4a) decision in *Hand* v. *Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649 (D. C., Del. 1944).

The limited condition imposed by the Chancellor represents his exercise of discretionary equity powers under traditional practices to shape the remedy as in his judgment the exigencies of the case demand. *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271 (1933); *Chapman* v. *Sheridan-Wyoming Case Co., Inc.*, 338 U. S. 621, 630 (1950); *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955); *The Hecht Company* v. *Bowles*, 321 U. S. 321, 328-330 (1944); *S.E.C.* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 455 (1940).

In substance, the petitioner is seeking to have this Court review the application of Delaware law by the Delaware courts, which this Court has declined to do. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company, supra; Arrowsmith* v. *Harmoning*, 118 U. S. 194 (1886); *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389 (1896).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari of the petitioner Erwin H. Ezzes should be denied.

Respectfully submitted,

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APPENDIX TO BRIEF OF GALLO RESPONDENTS IN OPPOSITIION TO PETITION FOR WRIT OF CERTIORARI BY PETITIONER ERWIN H. EZZES

Objector Ezzes' Motion for Reargument to the Court of Chancery

Objector Erwin H. Ezzes, by his attorneys, moves the Court for reargument upon the ground that the "new" Incentive Compensation Plan should not apply for the year 1963, not only as to the director defendants, but as to all of the beneficiaries under the plan, because the Chancellor's Finding of Fact at page 55 of the Opinion is that, "It is clear that the directors 'bargained' for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963", and, therefore, no one should be allowed to derive additional benefits under the "new" plan as to the year 1963.

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Of Counsel:

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200 West 57th Street
New York 19, New York

Dated: February 4, 1964

Extract From 1962 Chrysler Corporation Annual Report to Its Stockholders

Chrysler Corporation made significant and steady progress in all phases of its world-wide operations in 1962, the first full year under the company's new management. In each quarter of 1962, both dollar sales and earnings exceeded the totals for the same periods in 1961.

A good fourth quarter—the best for any such period in the company's history—carried net earnings for the year to $65.4 million, or $7.24 a share, compared with $11.1 million, or $1.24 a share for 1961. Net earnings for the fourth quarter of 1962 were equal to $5.57 a share, compared with $3.52 a share for the same period last year, and the previous fourth quarter peak of $3.97 a share in 1949.

Dollar sales for Chrysler Corporation and consolidated subsidiaries in 1962 amounted to $2,378 million, compared to $2,127 million in 1961. In the final quarter of the year, following the introduction of our all-new 1963 cars, sales totaled $836 million, an increase of 20% over sales of $696 million in the fourth quarter of 1961. World-wide sales of cars and trucks in 1962 totaled 892,299 units, compared with 802,003 units in 1961.

Reflecting the enthusiastic public acceptance of our 1963 cars, retail sales of Chrysler Corporation cars in the fourth quarter of 1962 amounted to 12.0% of all domestic retail car sales, compared with 9.6% for the first nine months of the year, and 10.3% for the entire calendar year.

The improved financial results for 1962, as well as the indications of continued progress in 1963, can be attributed in large part to the moves made in several key areas * * *.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

(10) INCENTIVE COMPENSATION PLAN

Under the provisions of the Chrysler Corporation Incentive Compensation Plan, awards may be made only for those years when consolidated net earnings before income taxes, provision for incentive compensation and interest on long-term debt exceed 7% of the shareholders' investment and of the long-term debt. The total provision for all participants in the Plan is limited to 5% of such excess. Awards are determined by a committee of directors none of whom are officers of the Corporation or entitled to receive awards under the Plan.

Awards of $2,000 or less are payable in one installment. Awards of more than $2,000 but less than $10,000 are payable in annual installments of $2,000, or the amount remaining if less. Awards of $10,000 or more are payable in five equal annual installments. Thus, awards may be payable in installments over a period of years up to five, and a participant may in a given year receive installments from awards for more than one year. Accordingly, the installments of the awards for 1957 and 1960 that were earned out December 31, 1961 were paid in 1962. No awards were made for the years 1958, 1959, and 1961.

The first installments of the awards for 1962 were earned out as of December 31, 1962 and will be paid on or before March 15, 1963. To earn out and remain entitled to receive payment of each subsequent annual installment of his award, the participant must be in the employ of the Corporation or a subsidiary throughout the year ending December 31 immediately preceding payment of that installment, unless the Corporation shall have waived such requirement, and, in the latter event, he must not have, at any time prior to the December 31 immediately preceding payment of that installment, taken other employment or

rendered services to others than the Corporation or a subsidiary without the consent of the Corporation, or conducted himself in a manner adversely affecting the Corporation.

See page 19 of the proxy statement for the proposal to change the incentive compensation formula.

(19-23) PROPOSAL NO. 4

AMENDING STOCKHOLDERS' RESOLUTION OF APRIL 17, 1956 TO CHANGE INCENTIVE COMPENSATION FORMULA

The proxy statements for the last two annual meetings of the stockholders have mentioned the derivative suits brought by certain stockholders against directors and officers of the Corporation. There are five of these—two in the Court of Chancery, New Castle County, Delaware, two in the Supreme Court, New York County, New York, and one in the United States District Court for the Southern District of New York. The alleged causes of action in the five suits are similar, although some of the suits do not allege all of the causes of action contained in the others.

The directors and officers of the Corporation who are defendants in these suits deny all of the charges of wrongdoing made against them. Attorneys for the plaintiffs in the suits have made lengthy and thorough investigation into the facts and circumstances involved in the suits and have taken depositions from present and former officers and employees of the Corporation. The Corporation produced for such attorneys a large amount of documentary evidence related to the allegations in the suits. The attorneys for the plaintiffs have proposed settling the suits. The directors and officers of the Corporation who are defendants in the suits assert that they are entitled to judgment dismissing the suits on the merits, but recognize that it is

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

desirable that such litigation be terminated without further protracted legal proceedings, thus avoiding the expense of further litigation and the expenditure of time on the part of directors, officers and employees of the Corporation whose efforts and energies should be devoted to the business affairs of the Corporation. The parties therefore have entered into a stipulation of settlement setting forth the terms upon which it is proposed to dismiss these suits and also a suit brought by one of the plaintiffs in the United States District Court for the Eastern District of Michigan to set aside the 1961 annual meeting.

The attorneys for the plaintiffs in the two suits in the Delaware Chancery Court have applied to that Court for approval of the proposed settlement and dismissal with prejudice of their two suits. The Court has directed that a hearing be held on the proposed settlement and has approved a notice to the stockholders of the Corporation containing the date on which the hearing will be held and information with respect to the suits and the terms of the proposed settlement which the Court has directed be sent to all holders of record of the Corporation's common stock as of February 26, 1963. A copy of the notice is enclosed with this proxy statement.

The stipulation of settlement provides that if it is approved by the Delaware Court, the parties will seek and if appropriate join in seeking dismissal of the other four suits referred to above (including any appeals in any of them). If the settlement is consummated, the action the Corporation brought against one of the plaintiffs in the above suits, for statements made by him relating to the Corporation's financial condition and credit that were alleged to have been defamatory will be dismissed, the Corporation will pay the legal expenses incurred by him in the action, and he will release his claim of wrongful prosecution of that action.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

One of the principal terms of the stipulation of settlement is that the formula for computing the total provision that may be made for incentive compensation awards by the Corporation be modified. This formula is set forth in a resolution that the stockholders of the Corporation adopted at their annual meeting on April 17, 1956, amending an earlier resolution that the stockholders had adopted in 1929. The stockholders' resolution as so amended is annexed to this proxy statement as Exhibit A.

The Board of Directors recommends that the stockholders adopt the resolutions annexed to this proxy statement as Exhibit [illegible], amending, subject to the approval by the Delaware Court of a settlement of the suits referred to above, the portion of the 1956 stockholders' resolution setting forth the formula for computing the total provision that may be made for incentive compensation awards. The favorable vote of the holders of a majority of the shares voting on the proposal will be required for the adoption of such resolutions.

Since the modification of the formula for computing the total provision that may be made for incentive compensation awards is a principal term of settlement and is necessary if the settlement is to be put into effect, a vote in favor of amending the 1956 stockholders' resolution to change the incentive compensation formula will, in effect, be a vote in favor of the settlement. However, under the provisions of Delaware law, the proposed settlement and the proposed dismissal of the two Delaware suits pursuant to the settlement can be effected only if the Court approves the settlement as fair, reasonable and adequate. The dismissal of the claims alleged in the suits, as provided in the proposed settlement, will be binding on all stockholders if the settlement is approved by the Court.

The 1956 stockholders' resolution, among other things, authorizes the Board of Directors to establish from time to

time one or more plans to enable officers and executives of the Corporation and its subsidiaries to share in the profits of the Corporation. Pursuant thereto, the Board of Directors in 1956 established a plan called the Chrysler Corporation Incentive Compensation Plan and also a Savings and Investment Plan.

This Plan continues the practice followed since 1929, pursuant to authority the stockholders granted, of providing for incentive awards in various forms to encourage the continued and energetic efforts of officers and executives of the Corporation and its subsidiaries and to attract able and competent new executive personnel. The Board of Directors believes that the basic objectives of the Plan are sound and that it has been and still is effective and of benefit to the Corporation and its stockholders.

Under the 1956 stockholders' resolution, incentive compensation awards may be made only for those years when consolidated net earnings of the Corporation and consolidated subsidiaries (as reported in the Annual Report to the Stockholders) *before* taxes on income and before provision for incentive compensation and interest on long-term debt of the Corporation, exceed 7% of the shareholders' investment in the Corporation and consolidated subsidiaries and long-term debt of the Corporation. Total provision for awards is limited to 5% of such excess.

Under the proposed amendment, incentive compensation awards for the years 1963 through 1966 may be made only for those years when the sum of (1) consolidated net earnings of the Corporation and consolidated subsidiaries (as reported in the Annual Report to the Stockholders) *after* taxes on income, (2) provision for incentive compensation, and (3) interest on long-term debt of the Corporation, exceeds 5½% of the shareholders' investment in the Corporation and consolidated subsidiaries and long-term debt of the

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

Corporation. The total provision for awards is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the Corporation during that year.

For purposes of comparison, if the existing formula, which is on a pre-tax basis, is converted to an after-tax basis using present income tax rates, the proposed amendment would require consolidated net earnings *after* taxes on income but before provision for incentive compensation and interest on long-term debt to exceed 5½% (instead of approximately 3½% under the existing formula) of shareholders' investment and long-term debt before incentive compensation awards may be made, and the proposed amendment would permit the total provision for awards to be 12% (instead of approximately 10% under the existing formula) of such excess.

Thus, the proposed amendment requires a higher earnings level before awards may be made. For example, under the existing formula the consolidated net earnings after taxes that were required for the year 1962 before awards could be made was $32,600,000. They would have had to have been $44,200,000 if the proposed formula had been in effect. The total provision permitted for awards under the proposed formula would have been less than under the present formula at all levels of consolidated net earnings after taxes below $93,600,000 if such formula had been in effect for 1962, but at all levels of earnings above this amount the total provision permitted for awards would have been higher than under the present formula because the proposed formula permits a larger percentage of the earnings above the minimum level to be used for awards than the present formula does.

Since shareholders' investment, long-term debt and interst thereon, and taxes on income will not be the same in the years 1963 through 1969 as they were in 1962, the con-

solidated net earnings required in those years before awards may be made will not be $44,200,000, nor will $93,000,000 be the earnings level at which the proposed formula will permit a total provision for awards greater than the present formula. The consolidated net earnings required for such purposes will be higher than such amounts if the total of shareholder investment and long-term debt in any of the years 1963 through 1969 is greater than it was in 1962, and will be lower than such amounts if such total is less than it was in 1962. Also, a decrease in income tax rates would mean that the proposed formula would permit a greater total provision for incentive compensation than the present formula at an earnings level lower than $93,000,000.

The proposed amendment to the stockholders' resolution described above would expire at the end of 1969. Therefore, it is also proposed that the stockholders adopt a further resolution requiring the Board of Directors, at a time deemed appropriate by the Board, to submit to the stockholders for action by them the question of extending and altering or amending, effective from and after December 31, 1969, the portion of the stockholders' resolution which sets forth the amount that may be provided for incentive plans. The Board of Directors may submit to the stockholders the question of extending, altering or amending such portion of the stockholders' resolution, effective at a time prior to December 31, 1969, provided, and the Board does not intend to so recommend unless, a majority of the members of the Board then in office who are not eligible to receive an award thereunder shall have determined that, because of a material change in circumstances, it is in the best interests of the Corporation that such portion of the stockholders' resolution be extended, altered or amended. The Board of Directors has no knowledge at this time of any anticipated material change of circumstances which would cause it to make such a determination.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

If the stockholders adopt the amendment, all of the other provisions of the 1956 stockholders' resolution pertaining to incentive compensation will continue in full force and effect. In such event, the Board of Directors intends to continue the Incentive Compensation Plan that it adopted in 1956, modified to comply with the proposed amendment or to adopt a new Incentive Compensation Plan on substantially the same terms as so modified, except in either case the Board of Directors may add provisions permitting a recipient of an award to elect, at his option, to defer payment of all or a portion of the award until retirement or other separation from the employ of the Corporation, and in such case to receive the same in Chrysler stock together with amounts equivalent to the dividends thereon.

Under the present stockholders' resolution and Incentive Compensation Plan, the computation of the amount that may be provided for incentive compensation awards is made by the independent Auditors of the Corporation. If the amount for any year shall for any reason prove to have been overstated and the awards for that year greater than the amount that it finally appears ought to have been computed, the excessive part of the awards are to be offset by the unawarded parts, if any, of amounts that were available for preceding fiscal years (beginning with the fiscal year 1955), and any remaining excess is to be deducted from the amounts available for incentive awards in the year in which the excessive awards are discovered and succeeding years until the excessive part of the awards is made good, without recourse to or charge against any recipient of an award. Additionally, no other adjustment on account of the excessive part of the awards is to be made in any year, including, without limitation, any adjustment of the shareholders' investment for any prior year or any adjustment of awards made prior to such discovery. To date, the Corporation

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 15, 1963

has no knowledge of any such overstatement of the amount that may be provided for incentive compensation.

Under the terms of the shareholders' resolution, the Board of Directors is authorized to determine the terms of any incentive plans and the officers and executives who are eligible. Under the present Plan, incentive compensation awards are made by a committee of directors who are not eligible to receive awards (the Incentive Compensation Committee). At present, the Incentive Compensation Committee consists of Messrs. Neil McElroy, Chairman, James C. Brady, Arleigh A. Burke, Robert G. Page, and Louis B. Warren. The committee is not obliged to award the full amount permitted by the incentive compensation formula in the stockholders' resolution.

Employees who are eligible for consideration for an award are salaried employees of the Corporation and its subsidiaries on the last day of any calendar year who receive, as of October 1 of that year, a specified minimum salary and who have not received or been entitled to receive overtime compensation at any time during the last six months of the year and who are not eligible to participate in any other incentive plan of the Corporation or any subsidiary. The Incentive Compensation Committee may fix a salary level higher than the minimum specified in the Plan, and for 1962 fixed a salary level of $925 a month except for participants who had received previous awards.

Awards are payable at the times and upon the terms set forth on page 10 of this proxy statement and may be paid in cash or in shares of Chrysler stock, or partly in each, in the discretion of the Incentive Compensation Committee. Any shares required for such purpose are to be purchased in the market and are to be valued at the average cost per share at which they were purchased or by such other method of evaluation that the Board of Directors shall deem rea-

sonable in the circumstances. No awards have been paid in stock since 1958.

The stockholders' resolution and the Incentive Compensation Plan give the Board of Directors full power to construe and interpret them, and to correct any defect or supply any omission or reconcile any inconsistency. However, neither of them can be amended so as to increase the total provision out of earnings for Incentive Plans except by a vote of stockholders.

The provision for incentive compensation for 1962 was $3,597,900 and awards were made to 2,495 officers and employees of the Corporation and its subsidiaries (including those payable to the directors and officers shown in the Remuneration Schedule on page 9). If the proposed formula had been in effect for 1962, the total provision permitted for incentive compensation awards would have been $2,942,268. It is impossible to state to what extent the same persons (including directors and officers) will participate in future awards.

The Board of Directors recommends a vote "FOR" amending the stockholders' resolution of April 17, 1956 to change the incentive compensation formula as set forth in Exhibit C and proxies will be so voted unless stockholders direct a contrary vote.

Rules and Regulations Under Securities Exchange Act of 1934

Rule 14a-3, 17 CFR § 240.14a-3

§ 240.14a-3 *Information to be furnished security holders.* (a) No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A.

(b) If the solicitation is made on behalf of the management of the issuer and relates to an annual meeting of security holders at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to such security holders containing such financial statements for the last fiscal year as will, in the opinion of the management, adequately reflect the financial position and operations of the issuer. * * *

Schedule 14A

* * *

Item 9. Bonus, profit sharing and other remuneration plans. If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will participate therein, indicate the approximate number of persons in each such class and state the basis of such participation.

(b) State separately the amounts which would have been distributable under the plan during the last fiscal year of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect.

(c) State the name and position with the issuer of each person specified in item 7(a), who will participate in the plan and the amount which each such person would have received under the plan for the last fiscal year of the issuer if the plan had been in effect.

(d) Furnish such information, in addition to that required by this item and item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing or other remuneration or incentive plans for (i) each director or officer named in answer to item 7(a) who will participate in the plan to be acted upon; (ii) all directors and officers of the issuer as a group; and (iii) all employees.

(e) If the plan to be acted upon can be amended otherwise than by a vote of stockholders, to increase the cost thereof to the issuer or to alter the allocation of the benefits as between the groups specified in (b), state the nature of the amendments which can be so made.

Rule 14a-9, 17 CFR § 240.14a-9

§ 240.14a-9 *False or misleading statements.* No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Rules and Regulations Under Securities Exchange Act of 1934

NOTE: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distingiush it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

[Note added, 21 F. R. 578, Jan. 26, 1956.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

—against—

SOL A. DANN, *et al.* and MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, *et al.* and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

—against—

SOL A. DANN, *et al.* and MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, *et al.* and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964).
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of Delaware is reported at 205 A.2d 343 and is set forth in full in the Appendix to the Hoffman Petition in No. 893 (pp. 9 to 30).* The opinions of the Court of Chancery of Delaware are reported at 198 A.2d 185 and are set forth in full at RA 61-105.

Jurisdiction

The Court lacks jurisdiction since the opinion of the Supreme Court of Delaware is dated November 17, 1964 and was entered November 18, 1964 and the petition for a writ of certiorari was not filed until March 4, 1965, more than 90 days later.

Petitions for re-argument of (1) Sol A. Dann, respondent, plaintiff below, (2) respondents, certain plaintiffs below in Civil Action No. 1330, other than Sol A. Dann, and (3) Herman Koenigsberg, respondent, objector below, were denied December 4, 1964 (PA 31-32).

Erwin H. Ezzes, Petitioner, an objector below, did not file a petition for re-argument with the Supreme Court of Delaware. The mandate of the Supreme Court of Delaware was issued on December 7, 1964 and was entered in the Court of Chancery on December 8, 1964.

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* Further references to numbered pages of appendices will be preceded by the following abbreviations: AA for Appendix annexed hereto; EA for Petitioner Ezzes' Appendix in No. 954, Oct. Term 1964; PA for Petitioner Hoffman's Appendix in No. 893, Oct. Term 1964; RA for Appendix of Certain Defendants Below, Respondents in Opposition in No. 893, Oct. Term 1964; DA for Appendix of Certain Defendants Below, Appellees filed in the Supreme Court of Delaware.

Questions Presented

1. Since Petitioner did not petition the Supreme Court of Delaware for reargument of its decision dated November 17, 1964 and entered November 18, 1964, is his petition for certiorari to this Court, filed March 4, 1965, untimely because not applied for within ninety days after the entry of the decision of the Supreme Court of Delaware?

2. Since Petitioner did not specially set up or claim in any of the courts below, nor did those courts decide, any federal question of substance does this Court have jurisdiction of the case under 28 U.S.C. §1257(3)?

3. Since the decision of the highest court of Delaware can be wholly sustained on independent grounds of state law, does this Court have jurisdiction of the case under 28 U.S.C. §1257(3)?

4. Where there is no violation of Section 14(a) of the Securities Exchange Act of 1934, should this Court grant certiorari to consider the abstract question of whether an alleged violation of Section 14(a) would prohibit a state court from approving a beneficial settlement of derivative stockholder suits without specifically referring to the 1934 Act, although, in approving the settlement, the state court applied standards of state law which are not different from the applicable standards under Section 14(a)?

Statutes and Rules Involved

The pertinent provisions of the statutes involving the jurisdiction of this Court on review by writ of certiorari, 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c) are set forth at AA 25. The pertinent provision of Rule 23(1)(f) of the Revised Rules of the Supreme Court of the United States is set forth at AA 25-26. The pertinent provision of Rule 14 of the Supreme Court of Delaware is set forth at AA 26. The pertinent provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a) and §78aa are set forth at EA 25-26. The pertinent provision of Rule 14a-9, 17 C.F.R. 240.14a-9 is set forth at AA 27. The pertinent provision of Item 9 of Schedule 14A—Information Required in Proxy Statement, following 17 C.F.R. §240.14a-11, is set forth at AA 28.

Statement

The Court of Chancery and the Supreme Court of Delaware have approved as a matter of business judgment the settlement of two stockholders' derivative suits brought by various stockholders of Chrysler Corporation ("Chrysler"). The Stipulation of Settlement provided that the two actions below, together with other related actions, be dismissed with prejudice and releases be delivered to the defendants, except defendant Newberg; in return Chrysler's Incentive Compensation Plan was to be amended to reflect certain changes found to be advantageous to Chrysler's stockholders.

Petitioner now argues for the first time that the settlement should be set aside because of an alleged violation of the Securities Exchange Act of 1934 and because he has been allegedly deprived of property without due process of law. In the courts below, however, Petitioner objected to the settlement basically on the grounds that certain of the claims to be settled were meritorious and valuable and that the change in Chrysler's Incentive Compensation Plan was not desirable and did not afford adequate consideration for the settlement. All of these claims were based on common law and after full consideration were found by both of the Delaware courts to be without merit and of no value. The Court of Chancery concluded (RA 86):

> "Having weighed the claims asserted by the objector Ezzes to have merit and the possible defenses, I conclude that the probability of success in litigating any of such claims is so remote as to entitle them to practically no consideration in evaluating the fairness of the terms of settlement."

After considering the possible prospective application of the change in the Incentive Compensation Plan, the Court of Chancery wrote (RA 99):

> "While it is true that there is no assurance that during the 'term' of this plan there will be a monetary 'saving' to the corporation, the fact is that business-wise it should benefit the corporation."

Both Delaware courts concluded that the settlement was fair and in the best interests of Chrysler's stockholders.

The Court of Chancery described the change in the Incentive Compensation Plan as follows (RA 89-90):

> "The proposed plan, as modified in accordance with the terms of the settlement, provides that for the years 1963 through 1969, incentive compensation awards may be made only for those years when the sum of (1) consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *after* taxes on income, and (2) provision for incentive compensation, and (3) interest on long-term debt of the corporation, exceeds 5½% of the stockholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the corporation during the year.
>
> "The basic changes brought about by the modification have been the conversion of what was previously a before-tax incentive plan into an after-tax plan, an increase in the set-aside (i.e., the return on the stockholders' investment before payment of any incentive compensation under the plan), and an increase in the percentage of compensation to be awarded after deduction of the set-aside.
>
> "Thus, the 1963 formula requires a higher level of earnings, before any award of incentive compensation may be made, by reason of the higher set-aside. Until the 'cross-over point' is reached (i.e., the point at a still higher level of earnings where the amount of the bonus fund would be the

same under both formulas), the higher set-aside under the 1963 formula would more than offset the higher rate of bonus so that a smaller bonus fund would be created under the new formula than under the 1956 formula. But once the level of earnings rises above the cross-over point a larger bonus fund will result under the 1963 formula than under the 1956 formula. However, under the 1963 formula, as a result of the increase in retained earnings, the set-aside in each succeeding year becomes greater than it would have been under the 1956 formula thereby requiring an even better earnings performance in each of these years to obtain the same bonus fund." (footnotes omitted)

After considering Chrysler's earnings prospects and the objectors' "selective use of available financial data with which in my opinion one may either agree or disagree" (RA 94), the Court of Chancery wrote (RA 95):

> "It is fair to say I think that no one can predict with certainty what degree of success Chrysler will have in its operations in future years. Although Chrysler enjoyed a series of profitable years from 1950 to 1957, it showed a loss in 1958 and 1959. No one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables, some of which have little, if any, relationship, to the amount of effort exerted by management. . . ."

The Stipulation of Settlement was presented to the court on March 6, 1963. Thereafter, a court-approved notice describing in full the considerations affecting

and the terms of the settlement was sent to the stockholders. A meeting of the stockholders was held on April 16, 1963, at which time they overwhelmingly approved the change in the Incentive Compensation Plan. Both the court-approved notice and the proxy statement mailed together to Chrysler's stockholders in connection with the April 1963 meeting explained in extensive detail the nature and effect of the proposed change in the Incentive Compensation Plan. The stockholders were well aware of the favorable earnings prospects of Chrysler which Petitioner now contends were not adequately disclosed. Indeed, at about the same time the stockholders' meeting was held, Petitioner filed his objections to the settlement in which he displayed his own knowledge of these matters, asserting, that "Chrysler and the remainder of the automobile industry, appear to be in the midst of an important business upsurge" and that on the basis of Chrysler's income trend, "the beneficiaries of the changed Incentive Plan will actually benefit from the change" (AA 30, 29).

Thereafter, in April and May, 1963, hearings were held on the settlement during which discovery was made and evidence adduced on Chrysler's earnings prospects and the availability of such information to the directors and stockholders. The testimony showed what is self-evident, that while the prospects were favorable, no one could say with any certainty what the actual results would be for the full year 1963 (DA 108, 110-11, 135-38, 144-47).* Whereas then and more so at the time the proxy was sent

* For example, in 1959 Chrysler earned $58 million in the first six months of the year, but ended the year with a loss of $5 million as a result of losses of $63 million in the third and fourth quarters (AA 31).

out, in March 1963, the 1963 earnings were uncertain, the situation had changed by the time the court had issued its decision on December 31, 1963. By the end of 1963, it was clear that the new plan would make available for distribution to Chrysler's employees a larger fund than would have been available under the old plan. (Contrary to Ezzes' oft-repeated assertions, the formula merely provides a maximum amount which may be distributed as incentive compensation. The amount actually to be distributed is determined by the disinterested members of Chrysler's Board of Directors and, in fact, in many years the disinterested directors determined to disburse substantially less than the maximum available for distribution.) The Court of Chancery found that the change in the plan was proper, indeed a "benefit" to the corporation. Nevertheless, because of the special situation of the defendants who are beneficiaries under the plan, the court placed a qualification on its approval of the settlement, writing (RA 99):

> "Thus, even with due allowance for the fact that the future operation under the plan is an 'unknown', I do not believe that it is appropriate for the director defendants who are beneficiaries under the plan to receive the fruits of the new plan for 1963. I will therefore approve the terms of settlement on the condition that the director defendants who are beneficiaries under the plan agree that as to the year 1963 they will derive no added financial reward solely as a result of the modification."

After this decision, certain of the objectors, including Petitioner, moved for reargument and urged the

court to extend the condition to all of Chrysler's employees who are beneficiaries under the plan for the year 1963 only. This the court refused, explaining that the directors were obliged to consider what the true situation was when the settlement terms were finalized and ripe for submission to the court and that they had a continuing duty to agree only to what was then fair. Under those circumstances, the court found that these defendants were in a position where at least for the year 1963 they could obtain a complete release from the litigation not only without paying anything personally but by finally approving a revised plan which would probably assure them even greater compensation payments for 1963. The court also explained that the other beneficiaries of the plan were not involved in approving the change, and not being defendants, were not receiving any benefit for the release of corporate causes of action against them. In further explanation, the court wrote (RA 104-105):

> "Moreover, in the long view of this plan one cannot say with objective assurance whether it will or will not be more beneficial to the participants. Indeed it may be less so. . . . Passing over the element of hindsight, I believe this point overlooks the fact, noted above, that we are dealing with a seven year plan. The fairness test cannot be applied by looking at the results of only one year. The imposition of the condition on the defendant directors was imposed for reasons special to them."

The Supreme Court of Delaware reviewed the exercise of business judgment by the Court of Chancery and appraised the factors affecting the settlement as follows (PA 25-28):

"Initially it is obvious that the settlement approved in this litigation does not take the traditional form of the payment of a *quid pro quo* by the defendants. The reason for this is obvious. Such a payment would be nothing more than a buying-off of the plaintiffs for the dismissal of worthless claims. . . .

* * * *

". . . Certainly, it is to the benefit of Chrysler stockholders to end this litigation. There is no hope of substantial recovery for their benefit by the continuance of the litigation, but there is assurance of cost to them in the event it is prolonged. Furthermore, it is at least arguable that the new Incentive Compensation Plan in the long run will benefit the stockholders of Chrysler by reason of the increased requirements of the so-called set-aside.

"It seems to us to make little difference under the circumstances of this litigation that the individual defendants who receive releases as a part of this settlement have in fact made no monetary payment in settlment. This, we think, necessarily follows from the fact that the claims asserted against the individual defendants have been found to be devoid of merit. . . .

* * * *

"The appellants, Sandler objectors, argue that the settlement should be disapproved because it confers no benefit upon Chrysler and because, for the year 1963, the amount which may be awarded as incentive compensation under the new Plan is some $1,500,000 in excess of that which could

have been awarded under the old Plan. The argument is, of course, primarily based upon the fortuitous circumstance that Chrysler's earnings for 1963 were greatly larger than for 1962. While the directors and officers of Chrysler may have realized the potentially greater earnings for that year, that fact has been taken care of by the Chancellor in the condition he imposed upon his approval of the settlement, that such persons not share in the incentive compensation award for 1963.

"A further answer to these objectors' argument is that, in all probability, over the long span of the future, the Plan in its operation will result in benefit to Chrysler's stockholders. Admittedly, no one can predict Chrysler's future earnings but, certainly, in a business such as the automobile industry, profits take their ups and downs and may well equalize themselves over a course of years."

At no time during any of the proceedings in the Court of Chancery nor in any paper submitted to the Court of Chancery did Petitioner raise any federal question or so much as refer to the Securities Exchange Act of 1934 or the Constitution of the United States. On the appeal to the Supreme Court of Delaware, Petitioner for the first time raised a question as to the adequacy of the information available to the stockholders regarding Chrysler's earnings prospects. After these respondents objected that the point was not properly before the Delaware Supreme Court since Petitioner had not raised it below, and after these respondents showed that all of the allegedly

omitted information appeared in Chrysler's 1962 Annual Report and was otherwise available to the stockholders, Petitioner for the first time in his reply brief even so much as referred to the regulations of the Securities and Exchange Commission relating to proxy solicitations, but did not assert there was a violation of the 1934 Act.

The Delaware Supreme Court rejected Petitioner's objection to the approval of the change in the plan and the alleged failure to disclose, writing (PA 29):

> ". . . these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge."

The Supreme Court of Delaware made no reference to the Regulations of the Securities Exchange Commission, the Securities Exchange Act, or any question of federal law. It stated that it was satisfied that the stockholders were fully informed and acted in the light of that information and that in any event the condition imposed by the Court of Chancery adequately took care of any objection. Notwithstanding, the Delaware Supreme Court's failure to refer to any federal question, Petitioner did not seek reargument or press any federal question in any way. For the first time, in this Court, Petitioner urges that Chrysler's 1963 proxy statement violated Section 14 of the Securities Exchange Act of 1934 and even more remarkably, asserts that he has been deprived of property without due process because of the alleged

failure of the state courts to consider the alleged violation of the Act, which he had not previously claimed.

Although it raises no federal question, Petitioner argues that the Chrysler Board of Directors illegally presented to the stockholders the proposal to change the incentive compensation plan because the Board action was not by a majority of disinterested directors and therefore in violation of Chrysler's by-laws. On this question of purely state law, however, the Delaware Supreme Court refused to find a violation, and further held as a matter of state law that stockholder approval cured any arguable technical defect.

ARGUMENT

1. A petition for writ of certiorari filed with the Supreme Court of the United States later than ninety days after the entry of the judgment or decree of the highest court of a state is untimely. 28 U.S.C. 2101(c).

The opinion of the Supreme Court of Delaware was dated November 17, 1964 and entered November 18, 1964. The petition for writ of certiorari was filed with this Court March 9, 1965, one hundred and six days after the entry of the lower court's opinion.

A timely petition for rehearing of the decree below will normally toll the running of the ninety day period. *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942). However, Petitioner did not peti-

tion for reargument in the Supreme Court of Delaware. Although other parties did petition for reargument, one party's petition for reargument does not extend another party's time to petition for certiorari. *Zimmern* v. *United States,* 79 F.2d 703 (5th Cir. 1935), *rev'd on other grounds,* 298 U.S. 167 (1936); *cf. Federal Trade Commission* v. *Minneapolis-Honeywell Co.,* 344 U.S. 206, 211 (1952) (substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion).

Petitioner would have this Court believe that the mandate of the Supreme Court of Delaware, issued December 7, 1964 and entered in the Court of Chancery on December 8, 1964 is the final judgment of the Supreme Court of Delaware. But by the very language of the mandate, this is not so (EA 21):

> "Whereas, by appropriate proceedings the said cause was duly appealed to the Court, and *after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on November 18, 1964,* a certified copy of which is attached hereto;" (emphasis supplied)

A mandate of the Supreme Court of Delaware is issued as of course by the clerk upon the expiration of the period allowed for the filing of a petition for reargument unless otherwise ordered by the court. *Rule 14 of the Supreme Court of Delaware.* It can readily be seen that the issuance of a mandate and its entry in the inferior state court are purely ministerial functions and do not alter rights already ad-

judicated. The lower state court is not vested with any discretionary authority.

In making the determination whether there has been a final judgment or decree of the state court, this Court is no longer bound by the "face of the judgment" rule. *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546 (1947). This Court examines not only the opinion of the state court, *Clark* v. *Williard,* 292 U.S. 112, 118 (1934), as well as the entire record to determine whether "there is nothing more to be decided", *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 72 (1946), but also the local law to determine what effect the judgment has under state rules of practice. *Brady* v. *Terminal Railroad Association,* 302 U.S. 678 (1937); *Brady* v. *Southern Ry. Co.,* 319 U.S. 777 (1944).

The opinion of the Supreme Court of Delaware (PA 9-30) clearly terminates the litigation between the parties on the merits of the case. In addition, the local practice of Delaware is to treat the opinion of its Supreme Court as the final judgment or decree in an action. Rule 14 of the Supreme Court of Delaware (AA 26) states in part:

> "In each cause *finally determined in this court,* a mandate or other appropriate process shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court." (emphasis supplied)

This Court has ruled that the order or judgment of the highest state court is controlling as to the running of the time to petition for certiorari even though

under state practice the actual judgment is that entered by an inferior state court on remittitur, as in New York, *Department of Banking* v. *Pink,* 317 U.S. 264, 267 (1943), or on rescript, as in Massachusetts, *Cole* v. *Violette,* 319 U.S. 581, 582 (1942). Furthermore, a state rule that a decision "becomes final 30 days after filing" does not extend the time, which runs from the date of the judgment. *Market Street Railway* v. *Railroad Commission,* 324 U.S. 548, 550-52 (1945).

Petitioner's time to apply to this Court for review by certiorari began to run from the date of entry of the opinion of the Supreme Court of Delaware, November 18, 1964. Timely petition for reargument was not made by Petitioner. February 16, 1965 was the last day for filing a timely petition for writ of certiorari in this Court. A March 4, 1965 filing was too late to give this Court jurisdiction.

2. Any title, right, privilege or immunity claimed under a federal statute must have been specially set up or claimed in the courts below to give the Supreme Court jurisdiction. 28 U.S.C. §1257(c). The party invoking the jurisdiction of the Supreme Court has the burden of affirmatively showing by the record that the federal question was properly raised, so that the failure of the state court to deal with it in terms cannot be considered, if such failure is grounded upon want of proper presentation. *Chicago Ind. & L. Ry. Co.* v. *McGuire,* 196 U.S. 128, 131-33 (1905); *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942). It is also essential that there be a final judgment and decree passing upon the federal point rendered "by the highest court of a state in which a decision could

be made." 28 U.S.C. §1257. As was stated in the *Chicago Ind. & L. Ry.* case (196 U.S. 133):

> "'. . . the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

Petitioner asserts that the proxy dated March 4, 1963 sent to Chrysler stockholders soliciting their votes for approval of the change in the Incentive Compensation Plan was false and misleading and violated Section 14(a) of the Securities Exchange Act of 1934 (Pet. p. 7) and that the decision below deprived him of property without due process (Pet. p. 16-17). But nowhere in his petition or appendix does he indicate that such a federal question was raised in the state courts.

It is too late to raise the federal question for the first time in the petition to this Court as it is not part of the record of the state court proceeding and it is that record which must affirmatively show a raising of the federal issue. See *White River Lumber Co.* v. *Arkansas ex rel. Appelgate,* 279 U.S. 692, 700 (1929).

Rule 23(1)(f) of this Court requires pertinent quotations of specific portions of the record to be made in Petitioner's statement of his case to show that a federal question was timely and properly raised in the

court of first instance and the appellate court. Petitioner must "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised . . ." Petitioner has not and cannot comply with this rule.

Nor has Petitioner carried out his burden of providing this Court with a certificate from the Supreme Court of Delaware to the effect that a federal question was raised and decided. See *Herb* v. *Pitcairn*, 324 U.S. 117, 127 (1945).

Because no federal question of substance has been specially set up or claimed or decided by the highest court of Delaware, the petition for certiorari should be denied.

3. It is well settled that this Court will decline to review state court judgments which can be wholly sustained on adequate and independent grounds of state law. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-36 (1875), *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the

> same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn, supra* at 125-26.

Thus, even if a federal claim is properly raised, as it was not by Petitioner, and the state court declines to consider it and renders its decision solely on non-federal grounds, this Court has declined jurisdiction. *Wood* v. *Chesborough,* 228 U.S. 672, 677 (1913).

The state grounds for the decision of the Supreme Court of Delaware are both independent of any federal grounds and are wholly adequate to support the decision, as can readily be seen from the opinion of that court (PA 9-30).

The State of Delaware has consistently adhered to the principle that a court, when called upon to approve a settlement and compromise of a pending litigation, need only consider the nature of the claims, the possible defenses to them and the legal and factual obstacles facing the plaintiff in the event of a trial, and exercise a business judgment in determining whether the proposed compromise is reasonable in the circumstances. *In re Ortiz' Estate,* 26 Del. Ch. 240, 253-54, 27 A.2d 368, 374 (1942); *Perrine* v. *Pennroad Corp.,* 29 Del. Ch. 531, 550, 47 A.2d 479, 488 (1946). The Supreme Court of Delaware in deciding that the settlement negotiated by the parties was, as a matter of business judgment, fair and reasonable, relied entirely on applicable Delaware law. *Kleinman* v. *Saminsky,* 200 A.2d 572, 575 (Del. 1964),

cert. denied, 13 L.Ed.2d 174 (1964) (No. 392, Oct. Term 1964); *Rome* v. *Archer,* 197 A.2d 49 (1964).

With no question as to the adequacy of the grounds of decision, and no doubt that the decision can be wholly sustained on independent grounds of state law, this Court should deny the petition.

4. Although Petitioner founds his entire argument on the bald assertion that there has been a violation of Section 14(a) of the Securities Exchange Act, he completely fails to show any tenable basis for such a conclusion. The only matters he asserts were not disclosed to stockholders were matters of public knowledge as to which he and the other stockholders were fully informed (PA 29; AA 30). Indeed, upon close examination it will be seen that Petitioner's insistence is that the proxy statement sent out in March, 1963 should have prognosticated industry sales and Chrysler's earnings for the full year 1963, which *then* would have resulted in a violation of Rule 14a-9 of the Securities and Exchange Commission and Section 14 of the Securities Exchange Act. *Union Pacific R. Co.* v. *Chicago North Western Ry. Co.,* 226 F. Supp. 400, 408-09 (N.D. Ill. 1964).

Actually, the Securities and Exchange Commission has very specifically spelled out what information should be furnished to stockholders in a proxy statement if action is to be taken with respect to any bonus, profit sharing or other remuneration plan. Item 9 of Schedule 14A of Regulation 14 of the Securities and Exchange Commission provides in part as follows:

"Item 9. Bonus, Profit Sharing and Other Remuneration Plans.

"If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

* * * *

"(b) State separately the amounts which would have been distributable under the plan during *the last fiscal year* of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect." (emphasis supplied)

Thus, the Commission has designated the manner in which the effect of profit-sharing plans is to be illustrated to stockholders and specified that it shall be done by applying the profit-sharing formula to the last year, which was done. Apart from this, an attempt to apply such a plan prospectively would run afoul of the very Rule upon which Petitioner relies. The Commission in its note to Rule 14a-9 explaining what it may regard as misleading within the meaning of this Rule gives as its first example the following:

"(a) Predictions as to specific future market values, earnings or dividends."

In essence, Petitioner seeks not to enforce fair standards of disclosure, but instead to deform them, trying to use Section 14(a) as the hammer. It is self-evident, as both courts below stated, that no one can predict the future and certainly no one could know almost a year in advance what the earnings level of a major industrial corporation such as Chrysler would be.

Petitioner made many unsupported charges below and each of them were carefully considered and rejected by both courts. In the face of a number of different assertions of inadequacy of disclosure, both courts found the information furnished to stockholders to be ample and full. In all of his arguments regarding the adequacy of disclosure, Petitioner invoked Delaware law and cited Delaware authorities. Petitioner at no time argued that the standards of Delaware law as applicable to this case varied in any degree from those of federal law. Indeed, for purposes of the point he now raises the standards are the same, *Kaufman* v. *Shoenberg*, 154 F. Supp. 64, 66-67 (D. Del. 1954). The Delaware Supreme Court very carefully considered Petitioner's objections as to disclosure and found them to be without substance. Petitioner never questioned the standard it applied or attempted to invoke any different federal standard.

Finally, Petitioner completely overlooks the fact that this case turns not upon mere private action, but upon steps taken in a proceeding under the aegis and control of a state court in disposing of suits committed to its jurisdiction. There is no reason or law which demands that such a court may not give such form of notice and conduct its proceedings in such a manner as satisfies it. Petitioner in no way can be said to have been injured. He was afforded and took full advantage of the opportunity for discovery and to litigate all the pertinent facts. That he tried and lost after full hearing is no cause to interfere with the state court proceeding or to extend the jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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APPENDIX

Relevant Statutes

62 Stat. 929, 28 U.S.C. 1257

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

63 Stat. 104, 28 U.S.C. 2101

* * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

* * * *

Revised Rules of the Supreme Court of the United States

Rule 23(1)(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and excep-

tions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Rules of the Supreme Court of Delaware

Rule 14. Mandate

(1) When issued—Petition for Re-argument—Stay. In each cause finally determined in this Court, a mandate or other appropriate process shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court. Such mandate, unless otherwise ordered by the Court, or unless a petition for re-argument is filed, shall issue as of course upon the expiration of the period allowed for the filing of a petition for re-argument. If the petition shall be denied, the mandate shall issue forthwith. The mandate shall, after reciting the proceedings in the court below and the hearing in this Court, direct the affirmance, reversal or modification of the judgment, decree, or order in the court below, and shall direct the court below to take such proceedings in conformity with the opinion of this Court as may be necessary. The mandate shall be signed, sealed and tested [sic] by the clerk.

* * * *

Rules and Regulations Under Securities Exchange Act of 1934

17 C.F.R. §240.14a-9

Rule 14a-9. False or Misleading Statements.

No solicitation subject to §§240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

SCHEDULE 14A

Information Required in Proxy Statement

Following 17 C.F.R. §240.14a-11

* * *

Item 9. Bonus, Profit Sharing and Other Remuneration Plans.

If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will participate therein, indicate the approximate number of persons in each such class and state the basis of such participation.

(b) State separately the amounts which would have been distributable under the plan during the last fiscal year of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect.

* * *

(1) * * *

Notice of Intention of Stockholder Erwin H. Ezzes to Appear, and Statement of Objections (Filed April 22, 1963)

* * * *

(6-7)

The spurious nature of the so called settlement proposal in the case at bar is shown not only by its failure to have the character of a true compromise, but as well by the fact that the defendants will actually benefit from the changed Incentive Plan, as follows:

(a) On the basis of Chrysler's income for 1962, the present income trend of Chrysler, and a projection of the substantial income figures of Chrysler for the first quarter of 1963, the beneficiaries of the changed Incentive Plan will actually benefit from the change.

(b) An application of the Changed Plan to the past history of Chrysler shows that if the Changed Plan had been in existence over the past years, the beneficiaries would have been entitled to more under the Changed Plan than under the Old Plan.

(c) The slight reduction under the Changed Plan in the amount of benefits allowable to the defendants when corporate earnings are in the lower earnings category, is far outweighed by the provisions made in the Changed Plan for increased benefits to the defendants when corporate earnings are in the higher earnings level category.

* * * *

Notice of Intention of Stockholder Erwin H. Ezzes to Appear, and Statement of Objections (Filed April 22, 1963)

(8-9)

(i) Even if none of the above premises were correct, it is evident that the Changed Plan seeks blanket judicial approval of matters having important future imponderables. Among these imponderables, is the question whether business conditions largely not of management's making, will result in such substantial earnings to Chrysler, that under the Changed Plan the defendants will be entitled to compensation of such magnitude that, looking back, the Changed Plan constituted a boon to them rather than the detriment which it is required to be if the Changed Plan is to be considered that which the defendants give as consideration for the release of the claims against them. The importance of this question is heightened by the fact that, according to the statistics, Chrysler and the remainder of the automobile industry, appear to be in the midst of an important business upsurge. If this were the true settlement that it is supposed to be, Chrysler would not have to determine whether to take the calculated risk that the defendants will get more in the future under the Changed Plan than they would have gotten if the Old Plan remained in effect. Since this consideration must be resolved before any judgment can be given as to the fairness of the Changed Plan as part of a so called compromise settlement, it follows that, apart from all other considerations, the proposed so called settlement should be rejected because calling for a calculated risk determination on the part of Chrysler concerning important future imponderables. * * *

* * * *

Excerpts from Objectants' Exhibit 405 in Evidence in the Court of Chancery

SALES AND NET EARNINGS

Year	Period	Car and Truck Unit Sales	Sales	Net Earnings (Loss)
			$(000,000)	
1959	1st Quarter	233,185	$ 690.5	$ 15.2
	2nd Quarter	306,369	840.9	42.8
	3rd Quarter	143,511	432.9	(34.2)
	4th Quarter	234,299	678.7	(29.2)
	YEAR	917,364	$2,643.0	$(5.4)
1960	1st Quarter	363,807	$ 925.8	$ 10.9
	2nd Quarter	330,944	825.7	12.8
	3rd Quarter	250,096	634.1	1.4
	4th Quarter	238,464	621.4	7.1
	YEAR	1,183,311	$3,007.0	$ 32.2
1961	1st Quarter	157,586	$ 431.5	$(21.9)
	2nd Quarter	214,443	563.0	6.2
	3rd Quarter	162,489	436.5	(4.8)
	4th Quarter	267,485	696.3	31.6
	YEAR	802,003	$2,127.3	$ 11.1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

BRIEF OF RESPONDENTS KARL S. HORVATH, JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION

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Radio Station WOW Inc. v. *Johnson*, 326 U.S. 120	2, 6

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Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENTS KARL S. HORVATH, JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION

This brief is in opposition only to the Petition filed on behalf of Erwin H. Ezzes and not with reference to any other petitions filed herein.

Opinions Below

The opinion of the Supreme Court of Delaware is reported as *Hoffman* vs. *Dann*, 205 A 2d 343 (1964). The opinion of the Court of Chancery of Delaware is reported as *Dann* vs. *Chrysler Corporation*, 198 A 2d 185 (1963).

Question Presented

Petitioner asserts that his petition presents the following question: Must a state court in passing upon the settlement of a stockholders' derivative suit which is governed primarily by state decisional law —common law and equity—give predominant weight under the supremacy clause to alleged violations of the proxy rules adopted by the Securities and Exchange Commission pursuant to Section 14(a) of the Securities Exchange Act.

Petitioner's difficulty is that his question was neither presented nor decided below; hence it cannot be here reviewed. *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 128; *Bailey* v. *Anderson*, State Highway Commissioner, 326 U.S. 203; *Parker* v. *Illinois*, 333 U.S. 571; *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 666.

Statement of Case

Petitioner does not attempt to comply with Rule 23 (f) of this Court which requires a detailed statement, supported by record references, showing at what stage of the proceeding he raised the federal ques-

tion, the method of raising it, and how the state court disposed of the question. He does not make this showing because none of these things happened.

The question of fraud in a proxy statement (whether under state or federal standards) was involved only tangentially in this case and arose as follows:

Plaintiffs in two stockholders' derivative suits pending in the Chancery Court of Delaware agreed with defendants to settle these suits. The considerations for the settlement, were the amendment of the Chrysler Incentive Compensation Plan so that a lesser bonus would be paid to Chrysler executives for inferior, and a greater bonus for superior, corporate earnings, and the recoveries and changes in management in Chrysler and other benefits which followed commencement of the litigation. Pursuant to the settlement agreement, the proposed amendment of the Plan was submitted to the stockholders together with a court-approved notice of the settlement which told the stockholders that a vote for the amendment was, in effect, a vote for the settlement. The stockholders approved the amendment by a vote of 6,699,016 to 144,240. (Appendix to Defendants' Brief in Opposition to the Petition of Arthur Hoffman, No. 893, p. 63.)

The court-approved notice required any stockholder objecting to the settlement to file a statement of his grounds of objection (Id. p. 16). Under such a notice the objecting stockholder becomes a defendant in the proceeding for settlement (*Cohen* v. *Young*, 6 Cir., 127 F. 2d. 721, 724) and is entitled, as such, to raise any defense, state or federal. Several objectors appeared, including Petitioner. Petitioner charged that

the proxy statement soliciting ratification of the change in the Incentive Plan was "tainted with fraud" because it did not adequately disclose "the nature of the claims and the effect of the proposed settlement" (Id. p. 69). In making this charge Petitioner relied wholly on state law; there was no mention of Sec. 14 (a) of the Securities Exchange Act. The Chancellor found the settlement fair and beneficial to Chrysler and that there was "no merit" to the charges of fraud in the proxy statement (Id. p. 69); and he approved the settlement with one proviso which was based on the objection of objecting stockholders other than Petitioner.

Such objectors had shown that due to extraordinarily good earnings in the year 1963, which were anticipated by the directors, payment of incentive compensation under the new Plan would exceed payment under the old Plan; and the Chancellor held that defendant directors should not be permitted to vote themselves increased compensation even though the Plan, as a whole, was beneficial to Chrysler (Id. p. 99). Accordingly approval of the Plan was conditioned on excluding these defendant directors from any increased compensation in 1963 "solely as the result of the settlement". (Id. p. 99). The condition was accepted and embodied in the final order. Petitioner and others filed a motion for rehearing in which they urged exclusion of all beneficiaries of the Plan from increased compensation for 1963, which was denied (Id. pp. 102-5). In this petition, as heretofore, no mention was made of Section 14(a).

On appeal Petitioner argued that stockholder approval of the change in incentive compensation was

invalid because the proxy statement did not disclose "the future profit potentials of Chrysler and the resulting possibility of greatly increased incentive compensation under the Amended Plan." The Supreme Court of Delaware rejected this argument as follows (Pet. p. 24.):

> "It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.
>
> "In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than the old Plan. The Chancellor, however, imposed as a condition upon the approval of the settlement the requirement that no director-defendant shall receive greater benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection."

Obviously the above decision is based on state principles of equity as expounded by the Delaware courts. The state court did not decide any question of federal law, or that federal law was inapplicable, because no such question was presented.

Petitioner mentioned Section 14(a) of the Securities Exchange Act only once—in his reply brief in the

Supreme Court of Delaware—where he argued that under Delaware law all material information had to be included in the proxy statement itself, citing two Delaware, and one New York, cases and citing only argumentatively Rule 14 A-9 under the Securities Exchange Act. This passing reference did not invoke federal law under the supremacy clause, or otherwise, but constituted merely a supporting argument as to what state law should be. (Appendix p. 9) The Delaware Supreme Court dealt with this point and rejected it as shown by the above quotation. Clearly, they did not consider that petitioner had invoked federal law. If petitioner thought that the Court had missed his point, he could have so stated in a motion for rehearing. He filed no such motion.

ARGUMENT

1. 28 USC Sec. 1257 (3) requires that a defense based on federal law be raised in the state court at the point required by state procedure. *Radio Station WOW Inc.* v. *Johnson,* 326 U.S. 120, 128; *Parker* v. *Illinois,* 333 U.S. 571. Cf. *Pan American Petroleum Corporation* v. *Superior Court,* 366 U.S. 656. Petitioner did not raise the federal question at any point.

2. The state court decided the case on state law because it was not asked to do anything else. If the Delaware court had entertained a request to consider applicable federal law (*Columbian Fuel Corporation* v. *Superior Court,* 158 Atl. 2d, 478 (Del. Sup Ct.), affd. 366 U.S. 656), the result would have been the same. The decision was basically factual; and to the extent that legal standards were involved any stand-

ards imposed by "federal common law" respecting omissions in a proxy statement are no more stringent than the high standards imposed by Delaware courts upon corporate fiduciaries. If Petitioner thought these standards were different he should have invoked the allegedly higher federal standard. Having failed to do so, the Delaware court was free to apply its own standard; and Petitioner cannot now seek review, in this court, as to whether there are different, and controlling federal standards. *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 666.

CONCLUSION

For reasons herein set forth the petition should be denied.

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APPENDIX

Page 5 of Petitioner's Reply Brief in the Supreme Court of Delaware

Failure to reveal the information to the stockholders either in the Proxy or the Notice of Settlement Hearings, is not excused by the argument that the stockholders previously had, or should have had, the information. They were entitled to have it in connection with the Proxy solicitation and Notice of Settlement Hearings. Only by being given the information in connection therewith, and in the context of a proxy solicitation, could the stockholders give an enlightened judgment on whether to give the directors the solicited proxy and whether to approve the proposed settlement.

Kerbs and *Lieferant*, cited on pages 17 to 18 of our main brief, require the information to be contained *in the proxy statement*. The Regulations of the Securities and Exchange Commission, forbid the solicitation of proxies by means of any proxy statement which omits to set forth a material fact *in the proxy statement*.

Reg. X 14 a-9, 17 CFR 240.14a-9.*

The burden of revealing material information is on directors soliciting proxies, and this burden cannot be thrust upon the stockholders.

Empire So. Gas Co. v. *Gray*, 29 Del. Ch. 95, 46 A. 2d 741 (1946).

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* Reg. X 14 a-9 promulgated pursuant to Sec. 14a of the Securities Act of 1934 reads as follows:

"No solicitation subject to Secs. 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

REPLY BRIEF OF PETITIONER ERWIN H. EZZES IN SUPPORT OF PETITION FOR CERTIORARI

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Statement

Respondents have filed three separate briefs. The brief of "certain defendants" will be referred to as the "CD brief." The brief of respondents Gallo et al, will be referred to as the "Gallo brief." The brief of respondents Horvath et al, will be referred to as the "Horvath brief."

—

1

The opinion of the Supreme Court of Delaware was not a final judgment

Respondents argue that petitioner's writ of certiorari was not timely filed, because it was not filed within 90 days after the Supreme Court of Delaware filed its opinion. They argue that the opinion of the Delaware State Court is a final judgment within the meaning of 28 USC Secs. 1257 (3) and 2102 (c).

The argument of the respondents is contrary to the determinations of this court as well as the local practice of the State of Delaware.

In *CIR* v. *Estate of Bedford,* 325 US 283 (1945), and *Puget Sound Power Co.* v. *King County,* 264 US 22 (1924), this court was confronted by an argument similar to that made by the respondents. In both cases this court rejected the argument and held that the "Mandate" of the court, and not the "opinion" of the court, constitutes the final judgment which starts the running of the 90 day period within which a petition for certiorari must be filed.

On page 26 the CD brief, said respondents have set forth Rule 14 of the Supreme Court of Delaware. The plain language of this Rule shows that, according to the local Delaware practice, it is the mandate, and not the opinion, which constitutes the final judgment. Said Rule 14 provides that in each cause finally determined in the Delaware Supreme Court, "a mandate . . . shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court." It then goes on to provide that no such mandate shall issue until after a petition for reargument has been denied, or until after the time allowed for filing a petition for reargument has expired. The purpose of this provision is to ensure that no mandate will issue until the time has passed within which the court could change any determination upon reargument, thereby insuring that the mandate will be a final judgment.

Rule 14 also provides that the mandate shall be accompanied by a copy of the opinion of the Court. If the opinion of the court were the final judgment, there would be no need either to issue the mandate or to provide that the opinion of the court must be annexed to the mandate.

A reading of the express language of the Mandate, found on pages 21-22 of the Appendix to the Ezzes Petition, shows that the mandate is the only paper issued by the Supreme Court of Delaware in the traditional form of a judgment. It is the only paper wherein "it is ordered and adjudged," and wherein provision is made for costs. The mandate is the only paper issued by the Supreme Court which is intended to be, and which by local Delaware practice is, the final judgment of the Delaware Supreme Court.

The Mandate of the Delaware Supreme Court was entered on December 7, 1964. The Ezzes certiorari petition was filed in this court on March 4, 1965. This is less than ninety days after the entry of the aforesaid final judgment. The petition was timely.

2

The opinion of the Delaware Supreme Court shows that petitioner Ezzes raised the question of the violation of the proxy solicitation provisions of the Securities Act in the Chancery Court and Supreme Court of Delaware.

Respondents argue that the Ezzes petition does not show, by reference to the record, that the federal question which he seeks to bring before this court, was raised in the State Court.

In this case there is no need to refer to the record in order to show that Ezzes raised the question of the violation of the proxy solicitation provisions of the Securities Act before the state courts of Delaware. The portion of the opinion of the Delaware Supreme Court which is set forth on pages 22 to 24 of the Ezzes petition, shows that Ezzes argued in both the Chancery and Supreme Courts of Delaware, that the 1963 Plan was invalidly approved by the stockholders of Chrysler because the directors did not include vital information in the proxy material. In its opinion, the Delaware Supreme Court expressly points out that Ezzes argued "... that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained," and "that there was no effec-

tive stockholder action because a fair disclosure of the facts was not made to the stockholders," and that the failure to include "in the proxy material" the information that the 1963 Plan would produce a substantially greater fund for 1963 than would the 1956 Plan, "constituted a breach by the directors of their duty to make a full and frank disclosure to stockholders." The opinion concludes by stating that the chancellor imposed as a condition to his approving the settlement, the requirement that no director-defendant shall receive greater benefits under the Plan in 1963 than he would have received under the 1956 Plan, and that "this condition adequately takes care of Ezzes' objection."

The respondents admit that Ezzes did raise the question before the Delaware Supreme Court and quoted Rule 14a-9 of the Regulations of the Securities and Exchange Commission in his reply brief. On page 9 of the Horvath brief, said respondents have quoted from page 5 of the Ezzes reply brief in the Delaware Supreme Court. This clearly shows that Ezzes raised the question in that court.

In fact, Ezzes' main point upon appeal to the Delaware Supreme Court was predicated upon his contention that the 1963 Plan was invalid, apart from any consideration of the fairness of the settlement, because of the improper proxy solicitation resulting from the failure of the directors to include in the proxy material the information which they had to the effect that the 1963 Plan would produce a substantially greater fund than the 1956 Plan. This was Ezzes' Point I in his main brief to the Delaware Supreme Court. It was his Point I in his reply brief to the Delaware Supreme

Court. It was the main thrust of his oral argument to the Delaware Supreme Court when the case was argued. The argument was also contained in Point VII of his main brief to the Chancery Court (Docket Entry No. 238), and Points I and VIII of his reply brief to the Chancery Court (Docket Entry No. 249).

On pages 11 to 12 of the Gallo brief, said respondents argue that Ezzes was prohibited from raising the question on appeal to the Delaware Supreme Court, because it had not been fairly presented to the Chancery Court for determination. As shown by Ezzes on pages 2 to 3 of his reply brief to the Delaware Supreme Court, this same argument, obliquely made by the defendants in a footnote to their brief to the Delaware Supreme Court, was contrary to both the facts and law of the state of Delaware. *Kerbs* v. *California Eastern Airways*, 33 Del. Ch. 69, 90 A 2d 652 (1952). As was said in *Kerbs*, at 90 A 2d 652, 659:

> "It should be noted that the plaintiffs did not call Section 9 of the General Corporation Law to the Chancellor's attention, but argued solely that the presence of interested directors could not be ignored in determining whether the plan received a majority favorable vote at the Board's meeting. While the plaintiffs did not wage this precise reason for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation

> the argument should not be considered. We think the point falls within the class of additional reasons supporting the plaintiffs' theory. Cf. Stephenson v. Commonwealth & Southern Corporation, 19 Del. Ch. 447, 168 A. 211 and Great American Indemnity Co. v. State to the use of Mills, Del., 88 A.2d 426."

The fact is that, as clearly appears from the opinion of the Delaware Supreme Court, that court did pass upon Ezzes' contentions concerning the invalidity of the proxy solicitation.

As nearly as we can make out, the respondents appear to argue that the opinion of the Delaware Supreme Court cannot be relied upon to show that Ezzes raised the question of violation of the proxy solicitation provisions of the Securities Act in the State Court, because the opinion of the Delaware Supreme Court does not specifically state that the court is denying Ezzes' federal claim. There are two answers to this argument.

First, as we pointed out on pages 3 to 4 of our petition for certiorari, Delaware is one of the states which appears to take the position not only that it is not required to enforce Sec. 14(a) in a State Court matter, but that it is prevented from doing so by the "exclusive jurisdiction" phrase of Sec. 27 of the Securities Act. One of the reasons for granting certiorari in this case, is to determine whether the position of Delaware is correct.

Second, it is not necessary either that the federal claim shall have been made to the State Court in any

particular form of words and phrases, or that the ruling shall have been put in direct terms. The claim is to be regarded as having been adequately presented if the record as a whole shows either expressly or by clear intendment, that the claim was made, and the necessary effect of the judgment has been to deny the claim. *Bryant* v. *Zimmerman*, 278 US 63, 67, (1928). As was said in *Bryant*, at 278 US 63, 67:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

3

Regardless of any provisions of State Corporate Law, the Delaware Supreme Court was obligated to determine the matter by the application of the Federal Law

Respondents argue that this court should decline jurisdiction because the judgment of the Delaware Supreme Court can be sustained on independent grounds of State law. The argument of the respondents is that the judgment of the Delaware Supreme

Court can be sustained on the ground that the settlement was, as a matter of business judgment, fair and reasonable within the meaning of Delaware State law. This argument misconceives the matter which petitioner Ezzes asks this court to hear.

The fairness and reasonableness of the settlement has absolutely nothing to do with the federal question which Ezzes asks this court to hear. By the express terms of the 1956 Incentive Compensation Plan, it could not be changed without valid stockholder approval. Hence, valid stockholder action and approval of the 1963 Plan was necessary before it could become effective. Stockholder action and approval was sought by the directors by means of proxy solicitation. Both the Delaware Chancery Court and the Delaware Supreme Court found that the directors had information which "assured the directors that the 'new' plan (1963 Plan) would produce a substantially greater fund than would the old plan (1956 Plan), for 1963." But not one word of this information was set forth in the proxy material which solicited the stockholders' votes.

Ezzes claims that the failure to include this vital information in the proxy material was a violation of Sec. 14 of the Securities Act, and that this omission invalidated the stockholders' aproval of the 1963 Plan. As a consequence, federal law requires that the 1963 Plan be held invalid, apart from any consideration of the fairness or adequacy of the settlement. It is thus clear that the state law to which the respondents refer, has nothing to do with the case.

The argument of the respondents is succinctly answered by reference to those cases which hold that this

court will take jurisdiction of a case where a purported non-federal ground is unsubstantial and illusory, or inadequate to suport the state court judgment. *Lawrence* v. *State Tax,* 286 US 276, 282-283 (1932); *Williams* v. *Kaiser,* 323 US 471, 478 (1945).

The situation at bar is the kind of situation which this court referred to in its opinion in *JI Case* v. *Borak,* 377 US 426 (1964), when it said that "the overriding federal law applicable here would . . . control the appropriateness of redress despite the provisions of state corporation law . . ." because "if the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of this section (Sec. 14) might be frustrated" (377 US 426, 434-435). Ezzes claims that the determination of the Delaware Supreme Court results in the very frustration which this court referred to in the above mentioned *Borak* case.

4

Respondents concede in effect that petitioner Ezzes is asking this court to hear a substantial federal question of nationwide importance

Respondents argue that the proxies were not false and misleading, despite the failure to include therein the vital information which the directors had to the effect that the 1963 Plan would produce substantially greater compensation for 1963 than would the 1956 Plan.

Respondents argue first, that there was no violation

of Sec. 14 of the Securities Act, because the information which Ezzes claims should have been set forth in the proxy material, had been previously disclosed in the Annual Report for 1962 which was sent to the stockholders one month prior to the proxy solicitation, and was largely a matter of public knowledge. The Delaware Supreme Court indicated that in its view, there would be no violation of Sec. 14 if the stockholders had the information in previous papers, or if it could be deemed a matter of public knowledge, even though it was not set forth in the proxy material. It held however, that the stockholders were not fully informed "with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan" (Ezzes appendix, p. 24). Despite this holding, the Delaware Supreme Court declared the 1963 Plan valid, on the theory that the limited condition imposed by the Chancellor adequately took care of the objection that the proxy solicitation violated Sec. 14.

Ezzes contends that the record shows that the stockholders did not have any of the information in question, and that even if some of the information had been sent to the stockholders in previous communications, this would not excuse the directors from their obligation to set forth the information in the proxy material so that it could be considered by the stockholders in the context of the vote which was being solicited. It thus appears that there is an important question of whether directors can absolve themselves of their obligation under Sec. 14 of the Securities Act, to include vital information in the proxy ma-

terial, by the claim that the stockholders had or should have had the information in another manner.

Second, respondents contend that if they had included the information in the proxy material, they would have violated item 9 of Schedule 14A of Regulation 14, the Securities and Exchange Commission's note to Rule 14a-9 concerning predictions as to future earnings, and the decisions referred to on pages 17 to 18 of the Gallo brief concerning the inclusion of forecasts and projections of future earnings in proxy statements.

Ezzes contends that the information which should have been included in the proxy material, does not come within the proscription of the aforementioned schedule, commission note, or decisions. If however, the respondents are correct, this serves to emphasize the importance of the question which Ezzes asks this court to hear. If the argument of the respondents is correct, there is an important conflict which should be resolved by this court.

Conclusion

It is respectfully submitted that the Ezzes petition for certiorari should be granted.

Respectfully submitted.

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